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THE OFFICE OF ATTORNEY GENERAL.

We have been reading, with considerable interest, the discussions in the English law magazines relative to the proposed division of the duties of the Lord Chancellor. Many of our readers are undoubtedly aware that it is now gravely proposed to vest the functions now exercised by this officer, in two different persons, — in fine, to establish the separate offices of Chief Judge in Chancery, and Speaker or President of the House of Peers. The proposed change generally recommends itself to all who are not victims to an excessive conservatism. It is acceptable to the legal profession, whose members naturally desire that the grand fountain-head of all justice should be kept pure and uncontaminated. It recommends itself to statesmen, who naturally feel that the influence of the presiding officer of the Lords should not be exclusively appropriated by lawyers. In fact, to all those with whom the idea of permitting the Queen to exercise a control over the hereditary branch of Parliament through the "keeper of her conscience" appears to be but a rude relic of olden time, the measure strongly recommends itself. It is on every account desirable that high judicial officers should, in all governments where the influence of the popular will is felt, even in the minutest

degree, be excused from mingling in what is vulgarly called "politics."

The reflections suggested by these proposed changes, recall to our attention a subject upon which we have for a long time intended to say something, and that is, the questionable propriety of considering the office of Attorney General of the United States a political one. We make bold to recur to the subject at this time, because, while that office is occupied by its present distinguished incumbent, we are confident that no one will attribute any motives but the true ones, to those who discuss the question. We also wish it to be understood, that the idea was originally suggested to us before Mr. Crittenden was called to the office, or was even thought of as a candidate for its honors and emoluments.

If we are correctly informed, the intimate association of the Attorney General with the Cabinet is of comparatively recent date. For many years he was not even required to reside at the seat of government; and was, consequently, left at liberty to pursue his practice wherever he found it most convenient, subject only to his paramount duty to the government. In this respect, his duties resembled those of the officer of the same name appointed by the governments of the individual States. It was not until the second term of the administration of President Madison, that this question attracted public notice, and the Attorney General was elevated, if elevation were possible, from the bar to the cabinet. The office was then held by that most eminent lawyer, William Pinkney, of Baltimore. Mr. Pinkney's ambition, like his reputation, was professional, not political. He enjoyed a large and profitable practice in the city of his residence, independently of his official duty, and the reputation which he had established was one which no official position could enhance. It is, therefore, that his resignation has been generally attributed to the passage of the act of Congress requiring the Attorney General to reside at Washington. Four years afterwards, upon the appointment of William Wirt, the same subject again

came up. Mr. Wirt was a lawyer. He was not a politician. His studies, his tastes, his sympathies, his experience, his ambition, all tended to confine him to that bar, in which his proudest laurels were earned, and for which even higher honors remained in store for him. He naturally wished that he office might remain as peculiarly a lawyer's post as at any time since the establishment of the government. It was under these circumstances that he addressed a letter to the chairman of the judiciary committee of the House of Representatives, which, we think, defines what should be the duties of the office more clearly than has ever been done elsewhere. Mr. Kennedy, in his recently published life of Mr. Wirt, has rescued this document from oblivion, and we publish it, that our readers may judge how far the office should be encumbered with those duties which appertain to a statesman rather than a lawyer.

TO THE HON. HUGH NELSON,

CHAIRMAN OF THE JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES.

Attorney-General's Office, March 27, 1818.

SIR: I beg leave to call your attention to the state of this office, and to some material defects which, I think, exist in the laws in relation to it; with the view that the subject, if you shall think it of sufficient importance to merit this course, may be presented, through your committee, to the consideration of Congress, before they rise.

The commission of the Attorney General "authorizes and empowers him to execute and fulfil *the duties of that office, according to law.*" The only law which points out those duties. is the act of Congress of the 24th of September, 1789, entitled an act to establish the Judicial Courts of the United States, the thirty-fifth section of which act creates the office, and designates its duties in the following words: "And there shall be appointed a meet person, learned in the law, to act as Attorney General for the United States; who shall be sworn or affirmed to the faithful execution of his office, *whose duty it shall be*, to prosecute and conduct all suits in the Supreme Court, in which the United States shall be concerned, and *to give his advice and opinion upon questions of law, when requested by the President of the United States, or when requested by the heads of any of the departments, touching any matter that may concern their departments.*"

It is to be observed that there is no duty which the President or any head of department performs, which does not involve some principle of law, under the head, either of the natural or conventional law of nations, constitutional law, or municipal law; consequently there is no duty which belongs to either of those officers, on which he has not the right to require

the opinion of the Attorney-General, and on which it is not continually required; and in relation, at least, to questions on municipal law, which are incessantly occurring, it is understood that the heads of departments consider the advice of the law officers conclusive.

In the operations of an office whose sphere of action is so wide, and whose decisions are of such extensive and unremitting practical effect, it would seem to be of consequence to the nation that some degree of consistency and uniformity should prevail; but, it is obvious, that these can be attained in no other way than by putting the incumbent, for the time being, in full possession of all the official opinions and acts of his predecessors.

Under this impression, when I had the honor of receiving the appointment, my first inquiry was for the books containing the acts of advice and opinions of my predecessors; I was told there were none such. I asked for the letter-books, containing their official correspondence; the answer was, that there were no such books. I asked for the documents belonging to the office; presuming that, at least, the statements of cases which had been submitted for the opinion of the law-officer had been filed, and that I should find, indorsed on them, some note of their advice in each case; but my inquiries resulted in the discovery that there was not to be found, in connection with this office, any trace of a pen indicating, in the slightest manner, any one act of advice or opinion which had been given by any one of my predecessors, from the first foundation of the federal government to the moment of my inquiry. Thus, the gentlemen who have held this office, in succession, have been in constant danger of being involved themselves, and involving the departments which depended on their counsel, in perpetual collisions and inconsistencies; exposing the government to that kind of degradation which never fails to attend an unsteady and contradictory course.

In noticing the omission to keep these records, and preserve the statements and documents, I am very far from intending any censure on my predecessors; for no law had enjoined it on them as a duty; and from the multitude and variety of questions which are unavoidably pressing upon this office, throughout the year, it is very apparent that the plan which I suggest could not have been executed, without an expense, in clerk-hire, office-fuel, stationary, &c., for which there is no provision by law.

After this explanation, I submit it to you, Sir, with great deference, whether it would not be expedient that some provision be made, by law, for keeping a record of the opinions and official correspondence of the Attorney General, in his office; and for preserving in his office the documents submitted for his advice.

Again: the subjects on which the Attorney General is occasionally consulted, and those on which he has to act in the Supreme Court, turn, not unfrequently, on the local laws of the several States. But these have not been furnished to his office; and the omission is a serious practical evil. Would it not be well that the office of the Attorney General should be supplied with these laws?

Another defect seems to me to exist in the law as it now stands. You

will observe that the only law which prescribes the duty of the Attorney General, and which I have already quoted, limits the obligation upon him, and, consequently, limits *his right* "*to give official advice and opinions*," to cases in which he shall be called upon, *by the President, or by any of the departments*, touching any matters which may concern their departments.

But, I am told, (and in my short experience, I have already found it true, in part,) that the advice and opinion of the Attorney-General *in his official character*, are called for by committees of Congress, standing and special, by all the District Attorneys, Collectors of Customs, Collectors of the Public Taxes, and Marshals throughout the United States, by Courts martial, (military and naval,) wheresoever they may sit, &c. &c.

If it be advisible to open the office of the Attorney General to applications of this kind, I submit it to you, Sir, whether it would not be expedient to have it provided for by law. 1. That the several officers and public bodies which have been mentioned, (instead of resting on the personal courtesy of the Attorney General,) may be authorized to call for his opinion, *as a matter of right*.

And 2d, (which strikes me as being of equal, if not superior consequence,) that the Attorney General himself may be justified in giving an *official opinion* in these cases.

For, in a government of laws, like ours, it seems to me of importance that the influence of every officer should be confined within the strict limits prescribed for it by law.

It cannot be questioned, from the connection of the Attorney General with the executive branch of the government, that his advice and opinions, *given as Attorney General*, will have an *official influence*, beyond, and independent of, whatever intrinsic merit they may possess; and whether it be sound policy to permit this officer or any other under the government, even on the application of others, to extend the influence of his office beyond the pale of the law, and to cause it to be felt, where the laws have not contemplated that it should be felt, is the point which I beg leave to submit to your consideration.

There is, however, a strong objection to any new provision which should go to open the office of the Attorney General, as *now organized*, to applications beyond the provisions of the act of 1789. It is this: I am convinced that no single unassisted individual, whatever may be his strength, his habits of industry, or the system and celerity of his movements, could discharge, in a manner satisfactory either to himself or the nation, the vast load of duties which would be thus thrown upon him, without devoting himself to them, *solely and exclusively*. The very frequent calls which are regularly and properly made on the office, under the act of 1789, and the careful and elaborate examination which it is often necessary to bestow upon these subjects, are found to be sufficient, in connection with the Attorney General's duties in the Supreme Court, to give the office, at present, almost constant occupation; and if, in addition to those duties, he shall be placed under a legal obligation to answer all the other calls which

have been mentioned, he must, unavoidably, abandon entirely the individual pursuits of his profession, and rest, for the support of his family, on the salary attached to the office. Even under the duties, as they now exist, *very little time* is left to the Attorney General to aid the salary of his office by individual engagements; a fact which may explain, in part, the frequent resignations of this office which have heretofore occurred.

I would not have troubled you with these suggestions, at this time, but that the subject strikes me as being of so much practical importance *to the nation*, as to merit consideration; and that it relates to an office whose defective organization, however grievous to the incumbent, or *injurious to the public*, would not be apt to force itself on the notice of others.

I have the honor to be, Sir, with very great respect, your obedient servant, WILLIAM WIRT.

Under the present practice, we believe the Attorney General is treated as being quite as much of a cabinet officer, as the Secretary of the Treasury or the Secretary of the Navy. Upon all questions touching the *policy* of the administration, he is officially consulted, and this although he may be called upon, at any time, to give an opinion upon the legal effect of any proposed measure. In the administration of President Polk, indeed, the office was regarded in so peculiar a light, that to eke out a supposed inadequacy of salary, and to place the Attorney General in this respect upon an equality with the other cabinet officers, it was proposed to add to his other duties the superintendence of the Patent Office. The project was never carried into execution, although the deficiency of income was temporarily supplied by appointing the Attorney General a commissioner to adjust the claims under the Peruvian Indemnity. We hope that the establishment of the Department of the Interior will prevent a second attempt to impose upon the office the anomalous duties of the Commissioner of Patents. How different from the practice in the .days of Pinkney and Wirt, when the professional reputation of the incumbent secured to him a lucrative and honorable practice at the bar, whenever he could be spared from his public duties.

Apart, however, from any considerations which professional pride might suggest for preserving this office in its original purity, there are many more serious reasons. The

duties of the Attorney General, as will be seen from Mr. Wirt's communication, are sometimes of an almost judicial character. It is his opinion which is always to be taken by the President of the United States or the heads of departments. And we presume that an opinion thus authorized and even required, is not to be disregarded by those who are entitled to it, — but that Presidents and Secretaries must, until the questions involved are definitely settled by the Supreme Court, abide by the decisions of their accredited legal adviser. How strange does it seem, then, that that officer, whose professional opinion is to control their public course, should nevertheless be recognized as an inferior member of their own body. And how manifestly unjust and unwise is it, that an officer, whose judicial character ought to secure him an independent position, and an exemption from all party attacks, should nevertheless be required to share the responsibility which necessarily attaches to all executive measures.

Recent English Decisions.

Hutchinson *v.* The York, Newcastle, and Berwick Railway Company.

Wigmore *v.* Jay. — May 22.

Master and Servant — 9 & 10 *Vict.*, *c.* 93 — *Pleading.*

A master is not in general liable to his servant for damage resulting from the negligence of a fellow-servant.

Aliter, if in the selection of the servant who caused the injury, the master has not taken reasonable care to choose a person of ordinary skill and care; or if the servant injured was not at the time of the injury acting in the service of his master.

Where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company and guided by their servants, was killed by a collision between it and another of their trains guided by others of their servants: *Held*, that no action under the 9 & 10 Vict., c. 93, was maintainable by his personal representative against the company, and that it made no difference in this respect whether the accident was occasioned by the negligence of the

servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

A party who had contracted to erect a building employed some bricklayers for the purpose, and it being his duty to provide the proper scaffolding, intrusted the care of this to his foreman. The foreman having used bad materials in the construction of the scaffolding, it broke, and one of the bricklayers was killed: *Held*, that, in the absence of proof that the foreman was a person deficient in skill or improper to employ for that purpose, no action under the 9 & 10 Vict., c. 93, was maintainable by the personal representative of the party killed against their common employer.

The declaration in the former case stated the accident to have arisen from a combined neglect of the servants who were managing the train in which the deceased was, and of those who were managing that with which it came in collision: to which the defendants pleaded, "That at the said time when, &c., the said locomotive steam-engine in the said declaration secondly mentioned was driven upon and against, and came in collision with, the said railway carriage in which the deceased was such passenger, &c., in manner and form as in the declaration is alleged, solely by and through the carelessness, negligence, unskilfulness, and default of the said servants of the defendants in the said declaration in that behalf mentioned, and for want of due care and attention by them, and not by or through any other negligence, unskilfulness, default, or want of due care and attention; and that the said engines and carriages, at the said time when, &c., were respectively under the guidance, government, and direction of the said several servants of the defendants in the said declaration mentioned, and of no other person or persons; and that the said several servants were then severally fit and competent persons to have the guidance, government, and direction of such engines and carriages as aforesaid respectively, as he, the deceased, at the said time when, &c., well knew. And the defendants further say, that the said carelessness, negligence, unskilfulness, and default, and want of due care and attention of the said servants of the defendants in the said declaration in that behalf mentioned, at the said time when, &c., and always, were wholly unauthorized by the defendants, and were entirely without the leave or license, knowledge, sanction, or consent of the defendants;" concluding with a verification: *Held*, that this plea was not an argumentative denial of the cause of action stated in the declaration.

Per Alderson, B. — No action is maintainable under the 9 & 10 Vict., c. 93, for the benefit of illegitimate children.

Semble, per Alderson, B., that in an action brought under the 9 & 10 Vict., c. 93, for the benefit of the wife and children of a person killed by accident, the fact that the deceased had a wife and children should be averred expressly, and not be stated by inference.

These cases are reported together as relating to the same subject.

HUTCHINSON *v.* THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

This was an action by an administratrix under Lord Campbell's Act, 9 & 10 Vict., c. 93, in which the declaration was as follows: — "Jane Hutchinson, the plaintiff in this suit, administratrix of all and singular the goods, chattels, and credits which were of Joseph Hutchinson, de-

ceased, at the time of his death, who died intestate, by William Bell, her attorney, complains of the York, Newcastle, and Berwick Railway Company, the defendants in this suit, who have been summoned to answer the plaintiff, as such administratrix as aforesaid, in an action on the case; for that whereas, before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of the said Joseph Hutchinson, the said Joseph Hutchinson was in the employ and service of the defendants, and while in such service and employ, the said Joseph Hutchinson, at the request of the defendants, and in the discharge of his duty as their servant, became and was a passenger in a certain railway carriage of the defendants, in and upon a certain railway of which the defendants were then possessed, to go in and by the said railway carriage from a certain place, to wit, Viego Bank Foot, to a certain other place, to wit, South Shields, which said railway carriage then was drawn in and upon the said railway by a certain locomotive steam-engine, and the said steam-engine and railway carriage then were under the guidance, government, and direction of the defendants, to wit, by certain then servants of the defendants in that behalf; and whereas, also, before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of the said Joseph Hutchinson, the defendants were possessed of a certain other locomotive steam-engine, which then was drawing divers, to wit, ten other railway carriages in and upon the said railway, and the said last-mentioned locomotive steam-engine and railway carriages then were under the guidance, government, and direction of the defendants, to wit, by certain then servants of the defendants in that behalf, yet the defendants, well knowing the premises, h[illegible] fore and in the lifetime of the said Joseph Hutchi[illegible] and after the passing of a certain act of Parliament, ma[illegible] and passed in the session of Parliament holden in the ninth and tenth years of the reign of her Majesty Queen Victoria, for compensating the families of persons killed by accidents, to wit, on the 29th October, 1848, behaved and conducted

themselves in so negligent, careless, unskilful, and improper a manner in and about the guidance, government, and direction of the said first-mentioned locomotive steam-engine and railway carriage in which the said Joseph Hutchinson was such passenger, as aforesaid, and also in and about the guidance, government, and direction of the said other locomotive steam-engine and of the said other railway carriages hereinbefore mentioned, that by and through the carelessness, negligence, unskilfulness, and default of the defendants and their said servants in that behalf, and for want of due care and attention, the said last-mentioned locomotive steam-engine so drawing the said last-mentioned railway carriages as aforesaid, to wit, on the day and year last aforesaid, was violently driven upon and against, and came into collision with, the said railway carriage in which the said Joseph Hutchinson was such passenger, as aforesaid, by means whereof the said Joseph Hutchinson then was greatly cut, crushed and wounded, and of the said cuts, crushes, and wounds the said Joseph Hutchinson, for divers, to wit, three hours next following, did languish, and languishing did live, and at the expiration thereof, to wit, on the day and year aforesaid, and after the passing of the said act, and within twelve calendar months, next before the commencement of this suit, the said Joseph Hutchinson of the said cuts, crushes, and wounds, died, leaving him surviving the plaintiff, who before and at the time of his death was his wife, and Ralph Hutchinson, Elizabeth Macdonald, William Hutchinson, Anthony Hutchinson, George Hutchinson, and Mary Jane Hutchinson, who before and at the time of his death were his children, to the damage of the plaintiff, as such administratrix as aforesaid, of [illegible]*l.*; and thereupon the plaintiff, as such administratrix as aforesaid, and for the benefit of herself and of the said children of the said Joseph Hutchinson, according to the provisions of the said statute, brings her suit." The declaration concluded with profert of the letters of administration. Plea, "The defendants say, that at the said time when, &c., in the said declaration mentioned, the said loco-

motive steam-engine, in the said declaration secondly mentioned, was driven upon and against, and came in collision with, the said railway carriage in which the said Joseph Hutchinson was such passenger as in the declaration mentioned, in manner and form as in the declaration is alleged, solely by and through the carelessness, negligence, unskilfulness, and default of the said servants of the defendants in the said declaration in that behalf mentioned, and for want of due care and attention by them, and not by or through any other negligence, unskilfulness, default, or want of due care and attention; and that the said engines and carriages in the said declaration in that behalf mentioned, at the said time when, &c., were respectively under the guidance, government, and direction of the said several servants of the defendants in the said declaration mentioned, and of no other person or persons; and that the said several servants were then severally fit and competent persons to have the guidance, government, and direction of such engines and carriages as aforesaid respectively, as he, the said Joseph Hutchinson, at the said time when, &c., well knew. And the defendants further say, that the said carelessness, negligence, unskilfulness, and default, and want of due care and attention of the said servants of the defendants, in the said declaration in that behalf mentioned, at the said time when, &c., and always, were wholly unauthorized by the defendants, and were entirely without the leave or license, knowledge, sanction, or consent of the defendants. And this the defendants are ready to verify." To this plea the plaintiff demurred, and the demurrer was argued at the Sittings in Banc after Michaelmas Term, before Parke, Alderson, Rolfe, and Platt, BB., by *H. Hill*, for the plaintiff, and *J. Addison*, for the defendants. *Cur. adv. vult.*

WIGMORE *v.* JAY.

The action in this case was also founded on the 9 & 10 Vict., c. 93. It was brought by the administratrix of one C. R. Wigmore, and the declaration, after the usual commencement, proceeded thus: — "Before and at the time of the committing of the grievances hereinafter mentioned, the

defendant exercised and carried on the business of a builder, and was during all that time employed in the way of his said business to build a certain building, to wit, a certain wing to a certain college, called, to wit, 'The London University,' and thereupon heretofore and in the lifetime of the said C. R. Wigmore, to wit, on the 2d day of September, 1848, the defendant being such, and so employed, as aforesaid, did construct and erect, and from thence until the giving way and breaking down of the same, as hereinafter mentioned, kept and continued erected a certain scaffolding for the workmen and servants of him the said defendant during that time employed by him in the building of the said building, and of whom the said C. R. Wigmore, during all that time was one, to carry on thereon, and by means thereof, the work of building the wall and other parts of the said building, and for that purpose, and in the course of their said employment, to be and continue upon the said scaffolding with their tools, and with bricks, mortar, and other building materials and necessary things, at great heights above the ground; and thereupon, during all the time aforesaid, it became and was the duty of the defendant to have and keep the said scaffolding, and every part thereof, constructed of sound, safe, and sufficient materials and poles, and to take and use due and proper care and skill in that behalf, and otherwise in and about the constructing, erecting, and keeping of the said scaffolding, to prevent the said workmen and servants of him the defendant, while so employed upon the said scaffolding at such great heights above the ground, as aforesaid, from falling and being cast and thrown therefrom down to the ground, by the giving way and breaking down of the said scaffolding, or any part thereof; nevertheless, the defendant, not regarding his said duty, did not, nor would, during the time aforesaid, have or keep the said scaffolding constructed of sound, safe, or sufficient materials or poles, or take or use due or proper care, or skill, in that behalf, or otherwise in or about the constructing, erecting, or keeping of the said scaffolding, to prevent the said workmen and servants of

him the defendant, while so employed upon the said scaffolding, at such great heights above the ground, as aforesaid, from falling and being cast and thrown therefrom down to the ground, by the giving way of and breaking down of the said scaffolding, or any part thereof; but, on the contrary thereof, the defendant, on the day and year aforesaid, to wit, on the said 2d September, 1848, negligently, wrongfully, and injuriously, used a certain unsound and decayed pole, he the defendant then, and at all times afterwards, having notice that the same was unsound and decayed, to be and form a certain part of the said scaffolding, to wit, one of the ledger or horizontal poles thereof, at a great height, to wit, at the height of forty feet above the ground; and the defendant, so having notice of the said premises, as aforesaid, then negligently, wrongfully, and injuriously, formed and constructed the said part of the said scaffolding of such unsound and decayed pole, and negligently, wrongfully, and injuriously kept and continued the said part so formed and constructed, and the same was and continued so formed and constructed from thence until the giving way and breaking down of the same, as hereinafter mentioned; and the defendant, in that respect and otherwise, took and used so little and such bad care and skill in and about the constructing, erecting, and keeping of the said part of the said scaffolding, to prevent the said workmen and servants of him the defendant, while so employed upon the said scaffolding, from falling and being cast and thrown from the said part thereof down to the ground, by the giving way and breaking down of the same, that, afterwards, and in the lifetime of the said C. R. Wigmore, and before the commencement of this suit, to wit, on the day and year last aforesaid, the said C. R. Wigmore, then being one of the workmen and servants of the defendant then employed by the defendant in the building of the said building, as aforesaid, and being then in the due course of his said employment on the said part of the said scaffolding, to wit, the said ledger pole thereof, at such great height above the ground, as aforesaid, with his tools, and with bricks, mortar,

and other building materials and necessary things, at work there, and carrying on then, for the defendant, the work of building a certain wall of the said building, by and through the said wrongful act, neglect, and default of the defendant, the said part of the said scaffolding, to wit, the ledger pole, so then being unsound and decayed, and in that respect and otherwise carelessly, improperly, and unskilfully constructed, as aforesaid, did, by reason thereof, suddenly give way and break down, whereby the said C. R. Wigmore, so then being at work upon the said part of the said scaffolding, at such height above the ground, as aforesaid, then, with great force and violence, fell, and was cast and thrown from such height down to and upon the ground, and was thereby then grievously and mortally hurt, bruised, wounded, and injured, insomuch that by reason of the said hurts, bruises, wounds, and injuries so then occasioned to, and sustained by, the said C. R. Wigmore, as aforesaid, he, the said C. R. Wigmore, afterwards, and within twelve calendar months next before the commencement of this suit, to wit, on the said 2d September, 1848, died; by means of which said grievances the plaintiff, administratrix, as aforesaid, being before, and at the time of the death of the said C. R. Wigmore, the wife of him the said C. R. Wigmore, has lost and been deprived of the comfort of his society, and the protection, maintenance, and support by him of her the plaintiff, and also by means of the said grievances A. Wigmore and W. Wigmore, the infant children of the said C. R. Wigmore and the plaintiff his wife, who before and at the time of the death of the said C. R. Wigmore, their father, were dependent upon and maintained and supported by him, have lost and been deprived of the comfort of his society, and the protection, care, maintenance, and support by him of them his said children: to the plaintiff's damage, &c." Plea, not guilty. At the trial, before Pollock, C. B., it appeared that the defendant had entered into a contract to build the edifice mentioned in the declaration, and that the deceased was one of the bricklayers employed by him for that purpose. The defendant being bound to supply the requisite scaffolding, entrusted that duty to his foreman,

who used in its construction an unsound pole, the unsoundness of which had been previously pointed out to him; in consequence of which the scaffolding broke while the deceased was at work upon it, and he was thrown to the ground and killed. On this state of facts it was objected, that as the defendant had not interfered personally in the construction of the scaffold he was not liable, on the authority of *Priestley* v. *Fowler*, (3 M. & W. 1); and the Judge being of that opinion, directed a verdict for the defendant.

Watson, in Hilary Term, moved for a new trial, before Pollock, C. B., Parke, Alderson, and Platt, BB. The decision in the case of *Priestley* v. *Fowler*, on which the Judge proceeded at the trial, may be supported, though all the reasons given for it be not sound. In that case the declaration alleged that the defendant had directed the plaintiff, as his servant, to go with certain goods, in a van conducted by another of his servants, in carrying goods for hire, on a certain journey; that the plaintiff, in pursuance of such direction, was proceeding and being carried in the said van, &c., and it became the duty of the defendant to use due and proper care that the van should be in a proper state of repair, and not overloaded, and that the plaintiff should be safely and securely carried thereby; that the defendant did not use proper care, &c.; in consequence of the neglect of all and each of which duties, the plaintiff was thrown out and injured. After verdict for the plaintiff, this declaration was held bad; and the Court, in delivering judgment, said, "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore,

who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to health; of the builder for a defect in the foundation of the house, whereby it fell, and injured both the master and servant by the ruins." In several of the cases thus put, the master had nothing to do with the thing which caused the mischief, for he had employed a person of skill to see to it. But *Priestley* v. *Fowler* itself is inapplicable here, for this is not the case of a servant suffering through the negligence of a fellow-servant; it was the duty of the master to provide a proper scaffolding for those in his employ; and it is immaterial whether he discharges that duty by himself or his foreman. In the case of *Armsworth* v. *The South-eastern Railway Company*, (11 Jur. 758), indeed, where a servant of a railway company was killed through the negligence of his fellow-servants, his widow recovered against the company, but the question of their liability was not raised. Independent of the general question, the allegations in the declarations, that it was the defendant's duty to erect a safe scaffolding for his workmen, and that he erected an unsound one, of the unsoundness of which he had notice, are admitted by pleading the general issue; so that the objection to the plaintiff's right to recover, even if tenable, can only be taken in arrest of judgment. By Reg. Gen., Hill., 4 Will. 4, "In actions on the case, the plea of not guilty shall

operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea."

Alderson B. — You allege, in your declaration, negligence on the part of the master, and the only question is, do you prove it by showing negligence on the part of his servant? The point in this case is already before the Court in *Hutchinson* v. *The York Railway Company*, and as we have taken time to consider our judgment in that case, we will do the same in this, with the view of laying down some rule on the subject. I observe that the declaration says, that in consequence of the act complained of, an injury was done to the wife and children of the deceased, but there is no direct averment that he had a wife and children; it is only stated by inference. Now it is worthy consideration whether that ought not to be stated as an averment in fact; for Lord Campbell's act only gives the personal representative a right to sue for the benefit of the wife, children, &c., and it may therefore be that the administratrix here has no right to sue at all. There was a case before me, at Nisi Prius, where the children, on whose behalf an action like this was brought, turned out to be illegitimate, and consequently it was clear the plaintiff could not recover. *Cur. adv. vult.*

Judgment in both cases was now delivered as follows: —

Hutchinson v. The York, Newcastle, and Berwick Railway Company.

Alderson, B. — This was an action under Lord Campbell's act, brought by the plaintiff as administratrix of her deceased husband, Joseph Hutchinson, to recover compensation from the defendants, on the ground that he had met with his death by reason of the negligence of their servants.

The question on the record before us is, whether the defendants are liable for an injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages in discharge of his duty as their servant, in respect of which injury they would undoubt-

edly have been liable, if the party injured had been a stranger travelling as a passenger for hire. We think they are not. This case appears to us to be undistinguishable in principle from that of *Priestley* v. *Fowler*, (3 M. & W. 1.) In that case the plaintiff was the servant of the defendant, and had sustained an injury by the defendant's having overloaded a van in which he, the plaintiff, was travelling, by direction of the defendant, in discharge of his ordinary duties. That case was fully considered, and the Court, after a verdict for the plaintiff, arrested the judgment, on the ground that a master is not in general liable to one servant for damage resulting from the negligence of another; and some of the inconveniences, not to say absurdities, which would result from a contrary doctrine, were there pointed out.

The principle upon which a master is, in general, liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is, in truth, his own act. If the master is himself driving his carriage, and, from want of skill, causes injury to a passer by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master — it was the master's will that the servant should drive, and whatever the servant does, in order to give effect to his master's will, may be treated by others as the act of the master — *Qui facit per alium facit per se.*

So far there is no difficulty. Equally clear is it that, though a stranger may treat the act of the servant as the act of his master, yet the servant himself, by whose negligence or want of skill, the accident has occurred, cannot. And therefore he cannot defend himself against the claim of a third person; nor if, by his unskilfulness, he is himself injured, can he claim damages from his master, upon an allegation that his own negligence was, in point of law, the negligence of his master. The grounds of these distinctions are so obvious as to need no illustration.

The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted, that if, by the unskilfulness of A., a stranger is injured, the master is responsible: not so if A., by his unskilfulness, hurts himself; he cannot treat that as the want of skill of his master. Suppose then that, by the unskilfulness of A., B., the other servant, is injured while they are jointly engaged in the same service, there we think B. has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them, and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run that risk.

Now, applying these principles to the present case, it follows, that the plaintiff has no title to recover. Hutchinson, the deceased, in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which Hutchinson must be taken to have agreed to run when he entered into the defendant's service, and for the consequences of which, therefore, they are not responsible. The declaration, indeed, states the accident to have arisen from the combined neglect of the servants who were managing the carriage in which the deceased was travelling, and of

other of their servants, who were managing the train with which the deceased's carriage came into collision; and Mr. Hill argued that this allegation is divisible, and that, in order to sustain the declaration, it would not be necessary to prove any negligence on the part of the train in which Hutchinson was travelling — that it would be sufficient to prove negligence on the part of the other train; and so he contended that, even admitting that the defendants would not be liable for any neglect on the part of those who were managing the train or carriage in which Hutchinson was travelling, yet there could be no principle excepting them from liability for the acts of those who, though equally with Hutchinson servants of the defendants, were not, at the time of the accident, engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant, wherever he is acting in discharge of his duty as servant of him who is the common master of both. Now the death of Hutchinson appears, on these pleadings, to have happened while he was acting in the discharge of his duty to the defendants as his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters while engaged in their service; and, whether the death resulted from the mismanagement of the one train or of the other, or of both, does not affect the principle; in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run.

It may however be proper, with reference to this point, to add, that we do not think a master is exempt from responsibility to his servant, for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case the servant injured is substan-

tially a stranger, and entitled to all the privileges he would have had if he had not been a servant.

It was contended, that the plea in this case is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration. But we think Mr. Addison successfully showed this objection to be unfounded. Though we have seen that a master is not, in general, responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engaged to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears to us not to be open to the objection insisted on.

For these reasons we are of opinion that the plaintiff has shown no ground of action, and so our judgment must be for the defendants. — *Judgment for the defendants.*

WIGMORE *v.* JAY.

POLLOCK, C. B. — This case involves the same principle as the last; and there can therefore be no rule. It is impossible to distinguish it from that of *Priestley* v. *Fowler*, which has been referred to in the judgment just delivered by the Court. In the present case it appears that the deceased was a workman employed by the defendant to assist in the erection of a building; and the cause of the accident was some misconstruction of a scaffolding, in consequence of which it broke, and the husband of the plaintiff fell to the ground and was killed. The person who had erected the scaffolding, or assisted in the erection of it, was not suggested to have been a person deficient in skill, or im-

proper to employ for that purpose; and the ground on which the rule was moved was, that where a servant is injured by the negligence of another, in the course of their common employment, the master is liable to an action. We think, on very full consideration of the subject, that no such action lies, and the case of *Hutchinson* v. *The York Railway Company* has been delayed for some time, with the view of enabling us to give it that consideration. And I need not observe that, in that case, the question appears on the record, and is therefore capable of being carried immediately to a Court of Error, if the parties choose to take it there. The case of *Priestley* v. *Fowler* derives additional weight from the same circumstances, namely, that it was not a decision by merely refusing to grant a new trial, for the Court arrested the judgment after verdict, but the parties did not think it right to go to a Court of Error. Under these circumstances we think that there is no ground for a rule in this case. — *Rule refused.*

Court of Common Pleas. — Sittings in Banc after Hilary Term. — February 11.

KIDGELL *v.* MOOR.

Case—Reversioner—Obstruction of Way—Pleading—Arrest of Judgment.

Case by a Reversioner. — The declaration alleged that the defendant fastened a gate across, and thereby obstructed the plaintiff's way, and injured his reversion: *Held*, after verdict for the plaintiff, on motion to arrest the judgment, that the declaration disclosed a good cause of action. The Court assumed that the facts alleged had been proved to have injured the reversion.

CASE. — The declaration stated, that the plaintiff was seised in fee of a close in the occupation of J. K. as tenant thereof, the reversion belonging to the plaintiff; that the plaintiff of right had, and ought to have, a certain way from and out of the said close, over a certain other close of the defendant, into the highway; yet the defendant, well knowing the premises, but wrongfully intending to injure the plaintiff in his reversionary estate, and while the said close was so in possession of J. K. as tenant thereof to the

plaintiff, to wit, on, &c., wrongfully and unjustly locked, chained, shut, and fastened, a certain gate standing in and across the said way, and wrongfully and injuriously kept and continued the said gate so locked, chained, shut, and fastened, in and upon the said way, for a long space of time, to wit, from thence until the commencement of this suit, and thereby, during all that time, wrongfully and injuriously obstructed the said way, by means of which premises the plaintiff hath been injured in his reversionary estate and interest. Special damage, that one J. G. L. would not complete his contract with the plaintiff for the purchase of the plaintiff's reversion. First plea, not guilty, and issue thereon. The cause was tried before Rolfe, B., at the Summer Assizes, held at Abingdon, 1849, when the plaintiff had a verdict, damages 40*s*.

Whateley, in the following term, having obtained a rule nisi to arrest the judgment,

Keating and *Selfe* (Feb. 11) showed cause. — The objection in this case is taken in arrest of judgment, and the question is, not whether, at the trial, no obstruction was proved sufficient to injure the reversion, but whether, as matter of law, the facts alleged in the declaration could, by no possibility, injure the reversion. In the notes to *Pomfret* v. *Ricroft* (1 Saund. 322 a, note 5) the law is stated thus — "The question, in all cases of this kind, seems to be, whether the injury complained of is not a damage to the inheritance as well as to the lessee, so that if the reversioner wanted to sell the reversion, the injury would lessen the value of it." In *Jesser* v. *Gifford*, (4 Burr. 2141,) the obstruction was the building a wall, and that case was decided in favor of the plaintiff, on the principle laid down in *Pomfret* v. *Ricroft*, and without reference to the permanent nature of the obstruction. [*Cresswell*, J.— Fixing up a gate is not inconsistent with the right of way, but may be it was opened to let the tenant through; and the declaration does not aver that the tenant was obstructed.] The declaration says the defendant "obstructed the way:" after verdict, we may assume the way might be as much

obstructed by locking a gate across it, as by erecting a wall; either obstruction might be removed before the plaintiff came into reversion. If the obstruction must be of a permanent character to entitle the reversioner to maintain this action, whether it was so or not was a question for the jury. In *Jackson* v. *Peskel* (1 M. & S. 234) the judgment was arrested because the declaration did not aver any injury to the reversion. In *Baxter* v. *Taylor*, (4 B. & Ad. 72), Patteson, J., says, "The reversioner must allege in his count, and prove at the trial, an actual injury to his reversionary interest;" and in that case the objection to the evidence was taken at the trial. The Court here cannot say that the injury alleged was not proved. Possibly the gate was put here to deny the right of way; if so, the reversioner can have his action. (*Hopwood* v. *Scofield*, 2 Moo. & R. 34). The acts complained of would be evidence hereafter against the plaintiff's right. [*Cresswell*, J. — The acts of the defendant would not be evidence against the landlord, unless done without the consent of the tenant; and why are we to assume that? The fact of there being evidence against him is not enough, without showing an injury to his reversion.] There are no authorities for saying that the land itself must be injured; and the plaintiff has now a right to assume that special damage was included in the verdict, if it is necessary to do so. Had the reversion been put up to sale, it might have produced a less price in consequence of the obstruction. [*Shadwell* v. *Hutchinson*, (2 B. & Ad. 97); *Dobson* v. *Blackmore*, (9 Q. B. 991); *Young* v. *Spencer*, (10 B. & Cr. 145); *Tucker* v. *Newman*, (11 Ad. & El. 40); *Daniel* v. *North*, (11 East, 372); *Bright* v. *Walker*, (1 C. M. & R. 211); and *Alston* v. *Scales*, (9 Bing. 3), were also cited.]

Whateley and *Pigott*, in support of the rule. — The plaintiff must show two things: first, a permanent injury to some property; and, secondly, such an injury as would have entitled the tenant to maintain trespass. This declaration would be supported by proof that the gate on one single occasion was locked, in the absence and without

the knowledge of the tenant, and how can it be said that such an obstruction would injure the reversion? [*Williams*, J. — The evidence might have been that it was done on a hundred occasions.] The true principle is, whether the injury is permanent. In those cases which refer to the obstruction of ancient lights, there was an injury to the thing itself, which was demised; here there is none. No acts done during the continuance of the tenancy would prejudice the plaintiff's title, for it is not averred that they were done against the consent of the tenant, nor that they were done of right. (*Davis* v. *Black*, 1 Q. B. 911.)

Maule, J. — The declaration in this case is objected to on a motion in arrest of judgment. It alleges that the defendant wrongfully locked, chained, and fastened, a certain gate standing in and across a certain way of the plaintiff, and thereby obstructed the way, to the injury of the plaintiff's reversion; and I think that after verdict it must be taken to disclose a good cause of action, entitling the plaintiff to damages, and that the judgment ought not to be arrested. It may have been, that the evidence at the trial did not prove such an obstruction as injured the plaintiff's reversion; but if that was so, it might have been ground for a nonsuit, or for a verdict for the defendant. But the verdict was for the plaintiff, and is not objected to on that ground. The question is, whether, by any possible means reasonably to be inferred from the acts alleged in this declaration, the reversion could have been injured. It is not denied that if a wall had been erected across the way, it would have been an obstruction such as would have conferred a right of action upon the reversioner, although it might have been removed during the tenancy; so also might there be such a locking, chaining, and fastening of a gate across the way, thereby obstructing the way, as to injure the plaintiff's reversionary interest. It is not necessary to say what would be the effect if it were done by an agreement between the tenant and the defendant; it is enough to say that it might be as great an ob-

struction as the building a stone wall across the way, which, it is admitted, would have given a good cause of action. It is further objected, that the injury is stated in the declaration as an inference of law from the facts previously alleged. But I think the prefix "thereby" does not make what follows the less an allegation of fact. It is not like a statement that A. died seised in fee, leaving B. his heir-at-law, whereby B. became entitled, but it is an allegation of fact, not of law, as was held in *Brown* v. *Mallett*, (17 L. J., C. P., 227). On the whole, therefore, I think the declaration is good, and that the judgment is not to be arrested.

Cresswell, J. — I have had considerable doubt, during the argument, but I concur with my Brother Maule that we cannot arrest the judgment. The case of *Jackson* v. *Peskel* established that a declaration by a reversioner is bad, where the facts alleged do not obviously show an injury to the reversion; and there is no allegation that there was an injury. But if the acts may or may not constitute an injury to the reversion, and there is also an allegation that they did, the declaration is good. Here it is alleged as a matter of fact, and not as an inference of law, that the plaintiff's reversion was injured, and that allegation was proved, provided the acts stated could by possibility so operate. I think they could, and that the gate might be so locked, chained, shut, and fastened as to obstruct the way, and injure the plaintiff in his reversionary interest.

Williams, J. — I am of the same opinion. If, in point of fact, it had been proved that the obstruction was only made on one or two days, and for a short time only, as suggested by the defendant's counsel, the Judge ought to have told the jury to find for the defendant. But they have found for the plaintiff, and the Judge's direction is not complained of. The point, therefore, is removed to this — Could such a state of things by possibility have existed as to constitute an injury to the reversion? After verdict, we must presume, if possible, that such a state of things could have existed; and I think we can presume that.

The declaration, therefore, discloses a good cause of action, and this rule must be discharged.—*Rule discharged.*

Recent American Decisions.

District Court of the United States. — Eastern District of Pennsylvania.

Vanderslice *v.* The Steam Tow-boat Superior — in Admiralty.

Considerations stated by Kane, J., for holding a steam-tug to the rigid accountability of a common carrier, in opposition to the case in 3 Hill, N. Y. R. 9.

The captain of a steam-tug is the pilot of the voyage, and is the best judge of the sufficiency of the canal boat taken in tow to resist the weather, and of the adequacy of her crew to do what may be required for her protection, and cannot limit his responsibility by a notice given at the time of commencing the voyage, that it must be at the risk of the canal boat.

The steam-tug, notwithstanding such notice, is bound for the exercise of all that skill and care which the circumstances of the case demand.

Opinion per Kane, J.

The steamer Superior was customarily employed by the Philadelphia and Havre de Grace Steam Tow-boat Company, in towing vessels for hire between Philadelphia and the Delaware outlet of the Chesapeake and Delaware Canal.

On the 15th of March, 1846, Captain Metz, her commander, was applied to by the libellant, to tow his canal boat, the Judge Rogers, then laden with a valuable cargo, down the river.

Captain Metz objected, alleging that the state of the weather was such as to make the trip a hazardous one; but, being pressed by the libellant and several other masters of canal boats which were in waiting, he finally consented to take them, saying, at the same time, that "The weather was unfit to go down the river that day, and that if they must and would go down, they must do so on their own responsibility," or "at their own risk."

Three of the canal boats were thereupon attached to

the sides of the steamer; but one of them meeting with an accident immediately after, two only proceeded. Of these, one was very soon cast off, at the request of her captain; thus leaving only the boat of the libellant, who persisted in his purpose to go on.

They had not, however, made much progress before it was deemed prudent to detach the Judge Rogers from the side of the steamer, and to tow her astern. In doing so, the canal boat got into the trough of the sea, and rolled so heavily as to lose some casks of merchandise, that made part of her deck load; and it was then agreed that she should be run in upon the mud flats on the Pennsylvania side, above the pier at the Greenwich Point House, where it was thought she might take the shore safely.

It was ebb tide, and the wind was blowing hard from the Jersey shore. The manœuvre of casting off the canal boat was executed badly on one side or the other, and she struck against the pier with so much violence as to damage her greatly. She succeeded, however, in anchoring a short distance below; when the steamer, returning either for the purpose of rendering assistance, or of receiving the towline which had been left fast to the canal boat, came into collision with her so forcibly as to break several of her own paddle-wheels, and further to injure the canal boat, in a greater or less degree.

After this, the steamer again took her tow, conducting her, in a nearly sinking state, towards the Jersey shore; and, having almost reached it, she again cast her off, and directed her course for Philadelphia. But the depth of the water, and the adverse wind, and probably also the condition of the canal boat, prevented the libellant from beeching his boat by means of poles, and she, in consequence, drifted out into the stream. The steamer returned upon observing this; but, again coming into collision with her, broke into her stern, and completed her wreck.

The boat sank, her hatches came off, part of her cargo drifted out, and nearly, if not quite, all of the remainder was damaged.

I believe that there is no dispute upon the facts which I have recapitulated. The discrepancies in the testimony relate to the seaworthiness of the canal boat at the time of leaving Philadelphia, and the degree of skill and care displayed by the steamer in the subsequent incidents.

The libellant claims indemnity for the damage done to his boat and her cargo by these repeated collisions. He considers the steamer as in the occupation of a common carrier, and liable for all losses which have not been occasioned by the act of God, or of public enemies; and he denies that the limitation by the captain of his responsibility, by the notice to the libellant, if admissible at all, can be so extended as to exempt him from liability under the circumstances presented by the evidence. For he says, in the second place, that the loss was directly occasioned by a want of that ordinary skill and care, on the part of the steamer, which are engaged by every carrier of goods for hire.

The claimants, the Tow-boat Company, deny that they are common carriers; and assert that being ordinary bailees, bound as such, by force of the ordinary contract, only to the exercise of ordinary care and skill, their special disclaimer of responsibility, impliedly acceded to by the libellant at the time of contract, must be construed as exempting them from liability for every thing except just that measure of skill and care which would be exacted by the circumstances of a voyage which involved no special or extraordinary hazards. They affirm that they did exercise this measure of skill and care; that the collision of the canal boat against the pier was occasioned by her being insufficiently manned; and that, as to the two subsequent collisions, they must be referred to the state of the weather, and were, moreover, in their consequences, of no importance, since the first collision had reduced the canal boat to a state of wreck.

The first question thus presented is, — Whether steam-tugs, whose regular and constant business it is to tow boats for hire, are to be regarded as common carriers,

when the owner or master of the boat towed remains on board of it. Chancellor Kent, in his Commentaries, Vol. 2, p. 597, includes them in this class of bailees, but cites no authority for the position. On the other hand, Judge Story excludes them from it. (Bailments, § 496, referring, in the margin, to the case of *Alexander* v. *Greene*, 3 Hill, 9.)

I confess that, after reading that case over carefully, the reasoning of the Court does not appear to me conclusive, and that I am much more impressed by the argument of the counsel for the unsuccessful party. It has been suggested, that such steam-tugs should, perhaps, hold a place between common carriers and ordinary bailees for the carriage of goods; not liable in general for loss by fire or robbery, since the owner or his immediate agent has, to a certain extent, the continued supervision of his property, but to be otherwise held to the highest degree of accountability, since the vessel towed is, for the time, under their control — quite as much so as the baggage of a passenger in a stage-coach.

But, if they are not to form a distinct new category, I should be strongly inclined to the opinion that they must be treated as common carriers.

Their occupation is essentially a public one; they hold themselves out to the world as ready to serve all who will employ them; and they have whatever of advantage any common carrier can derive from such a public announcement.

They have the custody and direction of the vessel to be transported: it is generally fastened to the steamer in such a manner as not to be safely detached while the two are in motion, unless by the act of those on board the steamer; and if detached while on the way, the boat is without any power of providing for her safety. The hands on board the boat, moreover, receive their orders from the steamer's captain; and, in fact, the two move on together under the sole impulse and guidance of the steamer.

The vast interests which are daily confided to such

steam-tugs, the hazards to which our internal commerce may be subjected by a want of the highest degree of skill and care on the part of those who command them, and the difficulty of drawing the line, in a Court of justice, between the consequences of mismanagement and those of mere stress of weather, or, where these come together, as they often do, of assigning to each its appropriate share of influence ; — these considerations urge us very strongly to hold the steam-tug to the rigid accountability of a common carrier.

But I do not think it necessary to decide the question. Though the law of Pennsylvania, under which this contract was made, seems to be settled by the Supreme Court of the State, however reluctantly, that a common carrier may restrict his common law liability by special contract ; yet the extent to which such a limitation may go, is itself limited very strictly. It has never been contended, that the limitations can be so enlarged as to relieve him from the exercise of all ordinary skill, diligence, and care. The utmost for which he has ever been allowed to stipulate is, that his liability should be subject to the same rules as that of an ordinary bailee for hire.

What then was the liability of the steamer, considered as an ordinary bailee, who, at the time of contracting, had given to the master of the canal boat the special notice which is in proof? Independent of that notice, the engagement was for the exercise of adequate skill, and of reasonable care and prudence in towing the boat to her destination, — skill and prudence, both adapted to the circumstances, hazardous or otherwise. Did the notice vary this engagement ?

In the case of *Alexander* v. *Greene*, already referred to, it was decided that an engagement to tow a boat "at the risk of the master and owners thereof" relieved the steam-tug from all liabilities arising from a want of ordinary care and skill ; and it has been contended here, with great force, that the notice by Captain Metz, that if the canal boat determined to go, it must be on her own

responsibility or at her own risk, should have an equally broad effect.

I acknowledge that I cannot distinguish the two forms of expression so as to give them a difference of import. But I have not been able to satisfy myself, that the notice, in either case, should have the effect contended for.

I cannot conceive of a contract for transportation which shall be so limited, as to exonerate the carrier, when the property intrusted to him is destroyed by his negligence or want of skill. Such a contract would have no meritorious consideration: its terms involve no engagement at all: it means nothing but that the carrier will not fraudulently or wilfully destroy the property; and to this every man, whether carrier or not, is bound by the law of the land, in reference to the property of every other man, without any contract whatever.

In my judgment, a saving of this sort would be repugnant to the spirit and purpose, as well as the body of the contract; and, were such an interpretation claimed for the notice in this case, I could not regard it otherwise than as void. Such, I may remark, seems to be the opinion also of the accomplished editor of the American Leading Cases, in his comments on this decision.

But the claimants here do not assert this doctrine without qualification. They admit themselves bound for the reasonable skill and diligence which would be adequate to an ordinary risk; and only ask exemption from employing that higher skill and diligence which the particular emergency in this case called for.

Still I cannot accede to the legal policy which would sustain even such a limitation. It could never have a practical interpretation.

What is its import? Does it mean that if, in consequence of the storm, the captain of the steamer shall become too much absorbed in anxiety for his own safety to think of any thing else, this shall be enough to discharge him and his steamer from liability? Does it mean that he may cast off his tow to the mercy of the elements, so soon as he

becomes sensible that his own risk is increased by keeping it attached? His own safety and the safety of his tow would, no doubt, have been more complete, if neither had left the wharf at Philadelphia; now, what increase of peril, beyond that of encountering the elements at all, shall be deemed the *casus fœderis* which is to excuse his negligence or want of skill in meeting it? And how are we to subdivide and distribute the *indicia* of nautical skill and prudence, so as to mete out to the vessel under tow its just portion of them in the varying contingencies of such a voyage, — asserting for it all that would be needed in favorable weather, but denying its right to any more, — distinguishing circumstances into ordinary and peculiar, that differ only by inappreciable degrees, as the height of a wave, or the force with which the wind blows, and referring the injury which is complained of to one or the other class of causes; thus ascertaining whether the peril was within the contract or its limitation?

How shall we decide in reference to a particular case of peril or difficulty, that it called for *extraordinary* energies, but that the energies that combated it were merely *ordinary?*

It involves no hardship to the master or proprietor of a steamer, whose daily occupation is the navigation of the river, to assume that he is acquainted with its hazards, and fitted to decide whether the state of the wind and tide will allow him to carry down his train of canal boats in safety. He is the pilot of the voyage: he is the best judge even of the sufficiency of the canal boat to resist the weather, and of the adequacy of her crew to do what may be required for her protection. It is in evidence that when the water is smooth, and the tow-boats are attached in consequence to the steamer's guards, the hands of the tow-boats have nothing to do, — that boats have occasionally been towed in safety without any person on board, — at other times, when the boat is towed astern, a man is required to steer her, and a boy or another man to give occasional assistance. Sometimes a still larger crew may

be required by circumstances. Again, the form, dimensions, and lading of the tow-boat have their influence. A decked boat, with a light cargo, is perfectly safe in weather which would swamp an open boat, heavily laden. Now, when a boat offers herself for towage, it is the proper office of the master of the steam-tug to determine upon all these points, and to refuse to take her if she is either too imperfect in her structure and arrangements, too heavily burthened, or too lightly manned to meet the apparent hazards of the particular voyage. He would have this right, whether regarded as a common carrier or as an ordinary bailee; and I see no objection to requiring that he shall exercise it.

I am inclined, therefore, to decide that the limitation of the claimants' liability, which has been contended for, does not exist; and that the steam-tug, notwithstanding the notice, was bound for the exercise of all that skill and care which the circumstances of the case called for.

Did Captain Metz exercise this degree of skill and care?

I have examined all the evidence in the case very fully and cautiously. There is in it just about the usual conflict of recollections that belongs to controversies of this sort. Men who are parties in a scuffle, or on board different ships that come into collision, never agree as to where the blame lies: even lookers-on very seldom unite in detailing occurrences of an exciting character. Especially is this true as to times, distances, and even as to the order in which incidents have followed each other. It is often in consequence the most puzzling duty of a Judge, to determine, from the conflicting evidence of honest and intelligent witnesses, what the truth is which they all profess to detail. In such a case he is fortunate if he can get hold of some fact independent of memory — some landmark that cannot have been subjected to change. I think we have something of this sort in a part of the evidence here.

It is found in the position and course of the canal boat at the moment of striking the wharf, as determined by the

part on which she received the first injury. She struck on her starboard bow: her head, therefore, was that moment inclined outwards to the river, and off from the flats. She struck, moreover, with great violence; so as not only to break in her bow, but to indent or displace the wharf-log against which she struck. I do not see how these two circumstances can be explained, unless by the supposition that, at the moment of striking, she was obeying a powerful impulse derived from the steamer.

Now it is agreed on all hands, that the steamer and the canal boat were on the Jersey or weather side of the river, where it was determined that the boat should be cast off; that the steamer immediately directed her course towards the Pennsylvania shore, and reaching this side of the channel, passed immediately below the powder wharf, five hundred and sixty-two feet above the place of the first accident, still steering towards the flats. Then inclining down stream in the cove between the powder wharf and the wharf at the ferry, where the water was smooth, she skirted along the flats; the canal boat in the meantime steering towards the Pennsylvania shore. Arriving near the lower or ferry wharf, the steamer again headed outwards towards the deep water; and it was about this time, or immediately after, that the canal boat struck the wharf.

So far the witnesses concur. The witnesses for the steamer say, that soon after passing the powder wharf she slackened her speed, and at last checked it altogether for the purpose of enabling the canal boat to throw off the bow-rope; and that this would have been effected if the crew of the canal boat had been effective; but that the libellant being at his helm, and no other person on board but a boy who was not strong enough to unhook the rope, the libellant left his helm to assist him, and thus occasioned the accident, though the steamer had in the meantime thrown loose her tow-rope.

Now, it is plain that this of itself would not have produced the collision. Had the steamer stopped in time, and the tow-rope been fully slackened, the canal boat would

not have had sufficient headway to drive her against the wharf so forcibly; and her motion directed inwards by her helmsman, and aided by the wind, would have continued towards the shore, rather than outwards against wind and steerage.

The story on the other side, denies that the captain of the canal boat ever left his helm, and refers the injury to the continued speed of the steam-boat, which kept the tow-line *taut* until the boat was nearly in contact with the wharf, even while the steamer was heading out herself; and thus made it impossible for the boat to obey her helm. This view of the facts, which is borne out moreover by the testimony of those who witnessed the accident from the shore, seems to me to be fully corroborated, and, I have already remarked, by the force and direction of the boat's impact against the wharf.

There are numerous facts disclosed in the depositions which point to the same conclusion. It is not necessary for me to refer to them in detail. I have been particularly struck by the reported difference in the bearing of the two captains; the one, excited, intimidated, losing his presence of mind, hurrying about his vessel, multiplying orders, twice bringing his steam-boat into forcible collision with the sinking canal boat which he sought to rescue. The other, calm, resolute, efficient; endeavoring to secure his boat to the wharf by lines after the first accident; anchoring her when that failed; holding on to his chance of deliverance even after the steam-boat had become entangled with her afterwards; refusing to quit his post when warned that she was bearing down on him the second time; and even after she had again struck him, and he was driven down in the water to his knees by the last collision, holding on to his vessel till he had made fast to her bow the line by which she was dragged ashore at last after she had sunk. In a question which involves the seamanship and prudence of these two men in the circumstances which led to the first accident, I am justified in referring to their subsequent conduct the disasters which followed.

I am constrained to say, that the captain of the steam-tug appears to have failed in the performance of what I suppose to have been his duty. It was not enough that he shut off his steam when approaching the wharf; for this would only check without arresting the motion of his vessel; he was bound, in the exercise of ordinary care, even if the weather had been calm, to see to it that the rope was adequately slackened to allow the canal boat to get ashore; and if he found that, from any cause, the rope was not at once detached, he was bound to wait till it could be done; or if the wind and his position made it dangerous for him so to stop on his course, he should have retained his hold of her, carrying her out with him into the channel again, and repeating his manœuvre at some lower point on the river. I fully acquit him of all wilful misconduct; but I cannot escape the conclusion, that, had he been more self-possessed than he appears to have been; in a word, had he exercised the ordinary skill and prudence which his contract of bailment implied, the first accident never would have occurred.

As to the two subsequent collisions, the argument for the claimants admits that they are without legal justification or excuse.

The preliminary questions which were raised upon the pleading, do not seem to me to involve a difficulty. The bailee of goods has such a property in them as will support a suit for damage done to them; and though the party damaged by a collision cannot in any case receive a double satisfaction, I do not see any reason for refusing him permission to include in the initiation of one proceeding his claim of recourse against the ship which has injured him, and against its owners to the extent of their interest in it.

The decree will be *in rem* for the libellant for the amount of his actual loss, by reason of the three collisions that have been referred to, with interest, in the nature of damages from the date of the occurrences, and with full costs; and it is referred to the commissioner to ascertain the amount of this decree.

Supreme Court of New Jersey — April Term, 1850.

Mershon et al. *v.* Hobensack.

The form of a question is very much in the discretion of the Judge, and if he exercise that discretion improperly in overruling objections to a question as too leading, redress can only be obtained by application to the Court for a new trial. It is not the subject of an assignment of error.

Persons will be held responsible as partners, who hold themselves out as such, to those from whom they thus obtain credit, even though no such relation may in fact subsist between them.

In an action *ex contractu*, the non-joinder of a contractor, as defendant, can be taken advantage of by plea in abatement only. It is immaterial that the fact of non-joinder is presented by the evidence of the plaintiff.

Common carriers are not excused from their liability as insurers of the goods carried, because the loss occurred by the fault of some third person, and not by the negligence of the carriers themselves. In the absence of any special contract, the causes which will excuse, must be such as will fall within the meaning of the expression, — Act of God or public enemies.

Quære, whether in assumpsit a defendant can be held liable as a common carrier, without proof of actual negligence, unless the character from which the duty arises, is expressly laid in the declaration?

Error to Mercer Circuit Court. The action below was in assumpsit, by Hobensack against Thomas Mershon & Son, to recover the value of goods lost on board their vessel between Philadelphia and Trenton. The plaintiff below having recovered a verdict, the defendants sued out a writ of error to the Supreme Court. The character of the suit and the exceptions taken will sufficiently appear in the opinion of the Court.

W. Halsted, for plaintiffs in error. *Beasely & Vroom*, for defendant.

The opinion of the Court was delivered by

Carpenter, J. — At the trial in the Court below, various bills of exception were sealed upon objections to the ruling of the Judge, upon which error has been assigned in this Court. The first bill was upon an exception taken, because the Judge refused to overrule a question objected to as too leading, and which was said to suggest the answer desired or expected. If the objection was well taken, as to which it is not intended to express an opinion, yet the error cannot be remedied in this mode. The form of a question

rests very much in the discretion of the Judge, and if that discretion is improperly exercised, redress can only be obtained by application to the Court for a new trial. It is not the subject of an assignment of error.

The refusal to non-suit formed the ground of the second bill of exceptions. The action is assumpsit, and the first count alleges the defendants to have been, at the time of the delivery of the goods, common carriers between Philadelphia and Trenton, and partners in said business. The goods lost and for which the action was brought, were proved to have been purchased by the plaintiff below in Philadelphia, and delivered to Captain Mershon, one of the defendants, on board the Trenton packet "Two Sisters," in order to be carried to Trenton. There was no question as to the fact of the vessel being engaged in the freighting business generally, and that those for whose benefit she was run came within the definition of common carriers, and were subject to the liabilities incident to that character. Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability, to be considered a common carrier. Evidence was given by the plaintiff to prove that the defendants were partners, and that they employed the said vessel in the freighting business between the two places. The joint liability rested upon this evidence, no proof of any special contract being made on the trial. The goods were delivered generally, to be carried to their place of destination. When the plaintiff rested, the counsel of the defendants moved to non-suit, because, as alleged, there was no sufficient evidence of the partnership. But even if the Judge erred, which it is not intended to intimate, yet this Court will not reverse, if sufficient evidence of the partnership was subsequently given. It will then be sufficient simply to inquire as to the proof of partnership appearing in the whole case, and which has been brought before us by bills of exceptions, afterwards sealed in the progress of the trial.

The Court having refused to non-suit the defendants,

produced and examined a witness who stated that the vessel in question, as well as another engaged in the same business, was owned by Abner Mershon alone; that another son of the said Abner was the captain of the boat, who received a share of the gross earnings or freight by way of compensation for his services; and further, that Thomas was not the captain of the boat, but was only accidentally in charge of her during the trip. But in the evidence offered by the plaintiff, he did not rely merely on proof of an actual partnership of the defendants as common carriers. The case made by the plaintiff was, that the defendants held themselves out to the public as partners, and were chargeable as such to third persons who gave them credit accordingly. If such case was supported by sufficient evidence, it was all that was necessary. They will be held responsible, not upon the ground of the real relation between them, but upon principles of general policy to prevent the frauds to which third persons would be liable who might give credit upon the faith of such supposed connection. The doctrine is too obvious and too well established to need the citation of authority.

The evidence showed that divers individuals, about the time when this controversy occurred, had had dealings with the defendants as freighters on the Delaware, and settled with them indiscriminately; that they were regarded by these persons and others as partners; that on payment of freight by such persons, and on other occasions, each at different times gave receipts; that receipts so given by them were signed "Abner Mershon & Son," or "Abner Mershon & Sons," and sometimes "Abner & Thomas Mershon." Thomas Mershon, as well as his father, was proved to have given such receipts, and to have spoken of the business in terms which implied that he was jointly concerned with his father. Thomas Mershon was not only proved to have given receipts, and to have taken a leading part in the transaction of the business connected with the boats, but the accounts of freight were entered in a book kept by him.

Both the defendants, at different times, spoke of the loss from the accident which gave rise to this action as one in which they were jointly concerned. It will not be attempted to recapitulate the testimony in detail, and it will be sufficient in general to say, that much evidence of this character was produced to show that the defendants held themselves out to the public as partners, and were so reputed and dealt with accordingly. Enough was shown to warrant the Judge in submitting the question to the jury. We must suppose it was fairly submitted upon proper instructions, as no exception was taken to the charge of the Court.

In the progress of the trial, the plaintiff offered to read in evidence certain receipts, some proved to have been signed by Thomas Mershon, others by Abner Mershon, for the purpose of establishing the existence of a partnership between them. The receipts now referred to were signed "A. Mershon & Sons." The admission of these receipts was objected to, and the objection being overruled, another bill was sealed.

It was said that the receipts so offered went to show, not a partnership between Abner and Thomas Mershon merely, but between Abner and two or more of his sons. Admitting that the defendants, in a suit against two partners cannot on the trial turn the plaintiff out of Court by proof of another partner against whom the action ought also to have been brought, but that advantage of the omission can only be taken by plea in abatement, the objection was, that the plaintiff in his evidence must be confined to the case as he has laid it; that, in order to prove a partnership against two, he cannot be permitted to prove a partnership between three persons.

The rule in regard to non-joinder is well settled, and has been unquestioned since the case of *Rice* v. *Shultz*. It is essential in an action against partners, and so against other joint contractors, in an action *ex contractu*, that the evidence of the joint liability should extend to all the defendants, otherwise the plaintiff must be non-suited. But if

all the partners are not made defendants, the case stands on a different footing. If the defendant would take advantage of the non-joinder, he must do it at the proper time by a plea in abatement. By forcing defendants to plead this in abatement or waive it entirely, they cannot turn the plaintiff round more than once, by setting up fresh partners upon every new action. They must plead the whole truth of the case, and give the plaintiff a better writ. It seems to be immaterial how the fact of non-joinder may be presented. Although it should appear, on the evidence produced on the part of the plaintiff, as by the bond or other written contract, that other persons are liable as joint contractors with the defendants, this is not a material variance, and the plaintiff will be entitled to recover. The very point in *Rice* v. *Shultz*, and other subsequent cases, is, that a contract alleged to have been made by a sole defendant, might be supported by proof of a joint contract made by him and others. The Court would not permit the objection to be raised at the trial to the variance between the case made by the plaintiff and his proof. It has even been held that in debt on judgment against one, and *nul tiel record* pleaded, it could not be objected as variance that the judgment was in fact against the defendant and others. The objection in such case must also be taken by plea in abatement. (*Cocks* v. *Brewer*, 11 M. & W. 51. See *Mountstephen* v. *Brooke*, 1 B. & Ald. 224; 2 Phil. Ev. 132. 1 Wms. Saund. 291, note 4.)

Lastly. — On the trial the defendants offered to prove, that there had been no mismanagement or want of care on the part of those having charge of the vessel, at the time the accident happened by which the goods were lost; that they did all that careful men could do to avoid the collision with the steamer, but that the accident was inevitable. This evidence was overruled, and the defendants again excepted.

Common carriers are in the nature of insurers, and the causes which will excuse them for the non-delivery of goods committed to their charge, must be events falling

within the meaning of the expression, Act of God and public enemies; or they must arise upon some event provided for by the contract between the parties, as by exceptions in the receipt, bill of lading, or other instrument employed in the transaction. (3 Kent, 216; 2 Ib. 598.) In this case the goods were not receipted for; there was no bill of lading or other instrument of contract, and the liability of the defendants therefore depends upon general principles, and not upon the meaning of any particular words of exception. There was no pretence to say that the accident in this case happened by the act of God, the disclaimer being simply that it did not happen through the negligence of those having charge of the boat of the defendants. It would seem as if it was imputed to the want of due care by those on board of the steamer, as the defendants in conversation with a witness expresssed their intention to apply to the Rail-Road Company, to whom the steamer belonged, for redress; as between the carriers and the owners of goods the negligence or misconduct of a third person will not excuse the former, since a remedy lies over against a party so offending. A collision which may occur through natural causes alone, as by the violence of the wind, may be called the act of God, and excused; but when it occurs through the negligence of either party, it can by no sound reasoning be brought within the meaning of that expression. The one implies a natural necessity, and that the accident was inevitable; the other relates to human action merely. If negligence was imputable to either party, the defendants are not excused. Now the offer was to prove due care on the part of the defendants, not to show that the collision was the result of natural causes beyond the reach or control of skill and care on the part of those in charge of both vessels. The offer did not go far enough to form any defence.

But if the strict rules as to common carriers are admitted, and that, under the general doctrine, this might form no defence, yet it was urged that this evidence was admissible under the second and third counts, in which it was said the

defendants were charged upon their special undertaking. It was said that in these counts, the declaration being not upon the common law liability as common carriers, but upon their special undertaking, in which negligence is charged in the breach, negligence was put in issue.

We are not clear that the counsel of the defendants is right, as to the necessity and effect of an averment of the employment of the defendants upon which the duty arises. In suits against common carriers the plaintiff may declare in case or assumpsit at his election, the former mode being sometimes advisable, in order to avoid the very difficulty which has been so much pressed in this case. When the plaintiff proceeds in case, for breach of the duty to which the defendant may be subject in respect of his employment as carrier, it seems necessary to state the character from which the duty arises. (1 Chit. p. 334, (Phil. ed. 1828); 2 Ib. 357, note; *Pozzi* v. *Shipton*, 8 Ad. & Ell. 963.)

In assumpsit, however, it has been held that it is not necessary to commence with an inducement of the defendants being common carriers. It seems to be supposed that it will suffice, if the declaration merely state the delivery to the defendant, &c., and his undertaking to carry accordingly. In *Dah* v. *Hall*, (6 Wils. 281), upon this very objection, there being no averment that the defendant was a common carrier, it was held that it might be proved that he was a common carrier, and that he was, under such declaration, answerable for all goods delivered to his care unless within the two excepted cases. It was held, that direct proof of negligence was not necessary to charge him, nor would the disproof of negligence relieve him from his liability. (In 2 Chit. Pl. 357, note; Bac. Abr. "Carriers," A. &c.) The case has been questioned as to the form of the pleadings by a late eminent jurist, but no direct authority has been produced to the contrary. The cases cited by the author referred to are rather as to the character of the evidence necessary to support the action, than upon the application of the evidence to the pleadings. (See Story on Bailments, § 504.)

But, assuming as urged by the counsel, that the plaintiff could not proceed upon the second and third counts, upon the mere proof of the public employment of the defendants, but that a special undertaking must have been shown to sustain those counts, yet the evidence was still incompetent. In the first count, the defendants were charged as common carriers, proof of that character had been given to the satisfaction of the jury, and of the delivery and reception of the goods, and upon this the law raised the duty to deliver them at the point of destination. The plaintiff had proved his case upon the first count, and it can be no defence to such a case to offer evidence against a supposed case, on other counts of the same declaration upon which the plaintiff has not proceeded. The evidence offered was no answer to the case made by the plaintiff upon the first count, and as to the second and third counts, it was entirely immaterial.

Judgment affirmed.

Abstracts of Recent English Decisions.

House of Lords.

(*Before Lord-Chancellor* COTTENHAM, *Lord* BROUGHAM, *and Lord* CAMPBELL.)

Baker, Appellant, *Tucker*, Respondent. July 9, 1850. — Although an old decision, which has been long followed as having settled the law, may be shown to have proceeded upon a wrong view of what the case was, it cannot be disregarded. 14 Jur. 771.

Court of Chancery.

South-eastern Railway Co. v. *Brogden.* Aug. 1850. *Equity and Law — Account — Concurrent Jurisdiction — Delay — Costs.* A railway contractor entered into two distinct contracts (No. 1 and No. 3) with a company, for the performance of works wholly unconnected and distinct. The contractor brought his action at law to recover a balance on contract No. 1. The company filed their bill, alleging complexity in the accounts, and that the accounts of contract No. 1 and contract No. 3 had become blended,

and that a Court of law could not properly adjudicate upon them, and praying that the accounts might be taken in this Court, and for an injunction to restrain the action. The contractor, by his answer, denied the complexity and blending of the accounts, but admitted that he had received various large sums of money which the company had appropriated to contract No. 3, and other large sums which the company had not appropriated to either contract, but which he had appropriated partly to contract No. 1, and partly to contract No. 3: *Held*, refusing to dissolve the injunction which had been granted by the Court below, that the question of the contractor's right to appropriate the general payments as he had done, had blended the accounts, and involved the necessity of going into the accounts of contract No. 3. Besides the claims which were covered by the declaration in the action, and which the Court considered proper subjects of action, the contractor claimed, in the schedule to his answer, divers sums of money for "general expedition in the works," for "losses occasioned by delays," for "loss of profit by reduction of quantities of works," and "for other breaches of and deviations from the contracts."— *Semble*, that these were such claims as a Court of law, sitting at *Nisi Prius*, could not properly dispose of.

Semble, mere delay of a defendant at law coming to equity in matters of account, forms no reason for refusing relief, where the nature of the account is such as a Court of law cannot deal with it. 14 Jur. 795.

McIntosh v. *Great Western Railway Company*. June 4, 1850. *Equity — Railway Contractor — Engineer's Certificates.* A railway contractor agreed with a company to execute certain works at stated prices, the company agreeing to advance him money on account of works done and executed, such execution to be certified by the engineer of the company, and after completion, the remainder to be paid; and it was provided that the works should not be considered as executed, unless done within the time specified, and certified by the engineer as having been so executed.

Bill by the contractor, alleging that the works had been completed, but not within the time specified by the contract, which delay the bill alleged to have been caused by the company; and that the engineer, acting in collusion with the company, and, by their direction, refused to give his certificate of the work being done; and praying an account and payment. Demurrer of the company for want of equity, overruled.

Where the inability of a plaintiff in equity to obtain adequate relief at law has arisen from the acts of the defendant or his agent, whether such acts arose originally from a fraudulent motive or not, this Court will not permit such acts to defeat the rights of the plaintiff. 14 Jur. 819.

Vice-Chancellor of England's Court.

Robinson v. *Hedger*. June 20, 1850. *Judgment — Charge — Insolvency.* A mortgage with a power of sale having been made, judgment was entered up by a creditor against the mortgagor, who was subsequently

imprisoned, and discharged under the insolvent debtor's acts. The mortgagees, whilst the mortgagor was in prison, and before a year had expired from the entering up of the judgment, sold under their power: *Held*, that the judgment creditor had a lien on the proceeds of the sale. 14 Jur. 784.

Vice-Chancellor Wigram's Court.

Clay v. *Rufford.* Feb. 14, 1850. *Company — Parties — Agreement — Specific Performance — Evidence of Term omitted.* The Court, in making a decree which is to bind absent parties, in a suit by the plaintiffs on behalf of themselves and others, is bound to ascertain, by strict proof, that the plaintiffs have the interest which they say they have. Therefore, where, in a suit by members of a company, on behalf of themselves and all the other members, proof of the execution of the partnership deed by one only of the co-plaintiffs, was adduced, the Court held this insufficient, but decided that, if necessary, the other co-plaintiffs might have an opportunity of proving that they filled the character they claimed.

The proof must be very clear which should induce a Court of Equity to refuse to enforce a written agreement, upon the ground that a term of the real agreement was omitted by mistake. 14 Jur. 804.

Vice-Chancellor Knight Bruce's Court.

Eccles v. *Birkett.* March 18, 1850. *Will — Income of Legacy — Vesting.* A testator, by will, gave all his real and personal estate to trustees, upon trust to invest the same, and thereout to pay an annuity, and, subject thereto, to pay to each of his children £3000, as and when they should respectively attain the age of twenty-five years; and he declared that it should be lawful for his trustees to apply all or any part of the income of each share of his said children for their maintenance and benefit, until he or she should attain that age; and also to apply any part, not exceeding £200, for his or her advancement: *Held*, that the legacies vested in the children at the death of the testator. 14 Jur. 800.

Ogle v. *Morgan.* May 6, 1850. *Will — Construction — Domestic Servant — Head Gardener.* A testator by his will gave "to each person as a servant in his domestic establishment at the time of his decease, a year's wages beyond what should be due to him or her for wages." A head gardener, who lived in a garden-house until the same was pulled down, and who then lived in a house provided by the testator, (a new garden-house being in course of erection) and whose house was attended by the servants of the testator, was held entitled to the benefits given by this bequest. 14 Jurist, 801.

Gee v. *Town Council of Manchester.* Feb. 12, 1850. *Will — Construction — Gift in Fee afterwards Qualified.* A. B. devised real estate to C. D., his heirs, executors, and administrators; he then directed that

if C. D. should die without issue, the estate should go to other persons; and in case C. D. died and having issues, they were to take their deceased parent's share: *Held*, that the words, "in the lifetime of the testator," could not be imported into the will. 14 Jur. 825.

Rolls Court.

Rhodes v. *Morse*. June 22, 1850. *Claim — Lost Cheque.* A. paid to the credit of his account with the L. & C. Banking Co. a cheque drawn by B. The cheque was lost, and B. having refused to give another, leave was given to the official manager of the banking company to file a claim to compel him to do so, on being indemnified. 14 Jur. 800.

Owen v. *Homan*. May 6, 1850. *Surety — Receiver.* The firm of H. B. & Co., consisting of Mr. H. and J. B., being indebted to their bankers, F. & Co., J. B., a partner in the firm of H. B. & Co., procured S. H., a married woman having separate property, to join with him as surety in certain promissory notes to F. & Co. Afterwards, H., B. & Co., being considerably indebted to F. & Co., dissolved partnership, and by articles of agreement between Mr. H., J. B., and the bankers, it was arranged that the business should be carried on by J. B. alone, that Mr. H. should be released from the debt to the bankers, and that J. B. should pay the debt by monthly instalments, and the remedies of the bankers against the sureties of H. B. & Co. were expressly reserved: *Held*, that the sureties were not released by this arrangement between the bankers and H. B. & Co., and that the bankers were entitled to have a receiver appointed of the rents of certain estates to which S. H. was entitled for her separate use for life. 14 Jur. 821.

Court of Queen's Bench.

Morris v. *Walker*. May 31, 1850. *Promissory Note.* Declaration on a promissory note payable to the order of O. M., indorsed by O. M. to the defendant, and by the defendant to the plaintiff. Plea, that the said O. M., in the declaration mentioned as the payer of the note, and as the indorser thereof to the defendant, is the same person as the plaintiff. Replication, that the maker of the note was indebted to the plaintiff, and that it was thereupon agreed between them, that, in consideration that the plaintiff would give time for the payment of the debt, he, the maker of the said note, would make it, and would procure the defendant to indorse it, by way of guaranty, of which the defendant had notice, and agreed thereto; and that the plaintiff did give time to the maker of the note, and did then, in pursuance of the agreement, and without any consideration or value whatever in that behalf, and for the purpose and in order that the defendant might, in pursuance of the agreement, indorse the note to the

plaintiff, first indorse the same to the defendant: *Held*, that the replication was not a departure. 14 Jur. 851.

Court of Common Pleas.

Blackster et al. v. *Gillett.* Jan. 15, 1850. *Case — Disturbance of Ferry — Pleading.* The declaration alleged that the defendant, contriving to injure the plaintiffs in the enjoyment of their ferry, carried passengers for hire across the river near to the ferry, whereby the plaintiffs were disturbed in the possession and profits thereof. Verdict for plaintiffs. *Held*, on motion to arrest the judgment, that the declaration alleged a good cause of action. 14 Jur. 814.

In re *John Foster*, a Bankrupt. Feb. 13, 1850. *Bankruptcy — Contingent Debt.* By indenture of 1841, F. covenanted to pay to trustees, for A. and his wife, so long as they or their issue should be living, such a sum as should alone (or together with the produce of certain other funds, if such there should be,) amount to £150 per annum. A fiat in bankruptcy issued against F. on the 24th October, 1842, at which time A., his wife and one child, were and still are living, but no produce from the other funds mentioned had or has since arisen: *Held*, that the trustees were not entitled to prove against the separate estate of the bankrupt for the arrears of the annuity since the fiat. 14 Jur. 814.

Elves v. *Crofts.* May 3, 1850. *Construction of Covenant — Restraint of Trade — Pleading.* Covenant on an indenture, whereby the defendant assigned to the plaintiff the residue of a term in certain premises, and the good-will of the defendant's trade as a butcher, there carried on. Covenant by the defendant, that he would not, at any time thereafter, directly or indirectly, exercise or be employed in the trade of a butcher, within five miles of the premises, and would do nothing to prejudice the trade of a butcher to be thereafter carried on by the plaintiff there, but would endeavor to promote the interest of the plaintiff. Breach, that defendant carried on the trade of a butcher within five miles: *Held*, that the contract was not void in restraint of trade. 14 Jur. 855.

Abstracts of Recent American Decisions.

Supreme Court of Pennsylvania — Abstracts of Decisions for May Term, 1850.

AT HARRISBURG.

[Reported for the American Law Journal, by P. C. Sedgwick, Esq.]

Good v. *Mylin.* Error to Lancaster. Gibson, C. J. It is not error to refuse to allow the counsel to read the opinion of the Supreme Court

on a former trial of the same cause, to the jury. The Judge may at his discretion keep it for his own guidance. Judgment affirmed.

Vanpool et al. v. *The Commonwealth.* *Certiorari* to Centre. BURNSIDE, J. Generally in criminal cases the errors which come within the jurisdiction of the Supreme Court, and will be noticed by it, must appear either on the indictment, the sentence, or somewhere on the face of the record.

In an indictment for forcible entry and detainer, that certainty of description of the premises which would support an ejectment is sufficient; and will justify the sentence of restitution to the prosecutor. Affirmed.

Jackson et al. v. *Somerville et al.* Error to Blair. COULTER, J. Fraud vitiates all contracts into which it enters, and cannot be affirmed by the party defrauded. Such contracts are essentially non-entities, and even legal proceedings and judgments founded upon them are voidable; and evidence to prove that the title of defendants was procured by actual fraud, first upon the plaintiffs, and then upon the Court, was admissible. Deeds procured by covin and falsehood, as between the parties, are as dead as forged deeds. So of a decree of a Court in case of imposition; and it may be inquired into in an issue not decided by the decree or judgment itself, upon allegation of the imposition. Such decrees are, as it were, *coram non judice.*

The true rule is, that where the parties have been heard, or due notice given, the judgment or decree of a Court of competent jurisdiction upon the point in issue cannot be overturned in a collateral proceeding upon an allegation of mistake or error. But where fraud entered into the procurement of the decree, the rule is not so.

The declarations of one of the parties guilty of the fraud may be given in evidence, as in conspiracy, after the concert has been proved. Judgment affirmed.

McKnight v. *Beisecker.* Error to Adams. BURNSIDE, J. Where it was agreed between two persons in Pennsylvania, that one of them going to Baltimore should purchase for the other a lottery ticket, and when the ticket was purchased and the money drawn by it was received by the purchaser and retained; an action will lie against him by the other to recover it. Judgment affirmed.

Furness v. *Ewing.* Error to Lancaster. Per Curiam. An administrator suing in his representative character is liable for costs. Reversed.

McCullough v. *Ex'rs. of Irvine.* Error to Cumberland. COULTER, J. A tenant for life cannot take down buildings and haul away the materials, or cut down valuable timber for purpose of sale, if the inheritance is thereby injured, without subjecting himself to an action of damages for waste. Such case does not come within those exceptions allowed to the general rule, for the benefit of trade.

The case was ruled below, on the principle that an action for waste will not lie, if the property is of equal value at the termination of the life estate, to what it was at its commencement. This is not the rule in Pennsylvania. The public interests require that property in such cases should be improved. Reversed.

Miscellaneous Intelligence.

RESIGNATION OF JUDGE WILDE. — In our last number, we had briefly time to announce that this venerable Judge had retired from the bench of the Supreme Judicial Court. In the fullness of time, it has come to pass that he who has occupied that post almost during the whole period of the recollection of those who now practise at the Bar, should pass from active life to the tranquil retirement of old age. The occasion is instructive, and has been improved by the Bar. It gives us pleasure to make the following record of the proceedings in Suffolk County.

We take the following record of proceedings from the Boston Transcript.

The Suffolk Bar and the late Justice Wilde. — The Bar held a meeting Saturday morning (Nov. 9) at 10 o'clock, in the Law Library Room, at the Court House, to take measures for testifying their personal respect for, and appreciation of the judicial services of the venerable Associate Justice Wilde, who has within a few days retired from the Bench of the Supreme Judicial Court of this Commonwealth.

Hon. Simon Greenleaf was called to the Chair, and Charles B. Goodrich, Esq. appointed Secretary.

Charles G. Loring, Esq. moved the appointment of a Committee of three, by the Chair, to report Resolutions expressive of the views of the Meeting, and accompanied his motion with some appropriate remarks. Benjamin Rand, Esq. seconded the motion, and the Chair appointed Messrs. Loring, Rand, and Hon. Rufus Choate, to constitute the Committee.

Hon. Benjamin F. Hallett urged the propriety of procuring a portrait of Justice Wilde, and the appointment of a committee for that purpose.

Charles P. Curtis, Esq. suggested that a bust would be more appropriate, and proposed that the Committee be empowered to procure either the one or the other, at their discretion. Mr. Hallett accepted the amendment, and the Chairman appointed Messrs. Hallett, Curtis, and Hon. Franklin Dexter as the Committee.

Mr. Greenleaf now made an Address, in which he passed high eulogiums upon the character and official services of Justice Wilde, and which was listened to with great interest and a hearty response by the full meeting present.

On motion of Sidney Bartlett, Esq. the Committee on Resolutions were instructed to present them to the Supreme Court on Tuesday Morning next, and move their entrance upon the Records of the Court. The Meeting then adjourned.

On Tuesday, Nov. 12, Benjamin Rand, Esq. presented the following Resolutions, which had been prepared by the Committee of the Bar.

Resolved, That the members of the Suffolk Bar have learned with profound regret, that the Hon. SAMUEL SUMNER WILDE, late a Justice of the

Supreme Judicial Court of Massachusetts, has tendered his resignation of the seat on that Bench, which he has occupied so long, with so much distinction and so much usefulness.

Resolved, That the judicial labors of Mr. Justice Wilde, extending, with scarcely the indulgence of an absolute vacation, over a period of more than thirty-five years, have been performed with admirable faithfulness, and with conspicuous ability; and that they have contributed in an eminent degree to settle and enrich the jurisprudence of the Commonwealth; to invest the Supreme Magistracy with respect, and the Law with reverence; to establish justice; restrain crime; and ascertain, vindicate and assure the civil rights and liberties of the people.

Resolved, That in that review of his services, virtues, qualifications, and traits of personal and official character and mind, to which the occasion naturally turns our thoughts, we appreciate and record with special admiration, his exact and deep knowledge of the common law of real property, the fruit of his earliest studies under our greatest teachers of that learning; his later mastery of the theory and practice of equity; the rapidity as well as soundness of his perception of legal truth; the fidelity, quickness, and capaciousness of his memory; the sagacity, firmness, and kindness of heart, the habits of dispatch, and the instantaneous command of the law, both of evidence and of principles, with which he presided over the trial by jury; his absolute and remarkable impartiality towards all the practisers before him, too just and too manly for antipathies or favoritism; and, to sum up all, his devotion to every duty of his office which seemed to gain strength to the last hour of his judicial life, and to which all his tastes, and all his enjoyments, were kept ever subordinate.

Resolved, That we see him retire from our presence with emotions of filial love, sorrow, and esteem; that we recall with deepest sensibility the long series of his kindness, by which our inexperience was assisted and our emulation of youthful distinction called forth; and that we would now convey to him with our whole hearts, our most earnest wishes that his virtuous and venerable age may be prolonged, and be happy; that it may be soothed by the retrospect of a life of great duties well done; by the enjoyment of that pure and judicial fame which follows unsought; by the assiduousness of kindred; by the amenities of letters; and the consolations of religious faith.

Resolved, That the Chairman and Secretary be requested to communicate to him a copy of these resolutions, and of the proceedings of this meeting.

Mr. Rand prefaced these resolutions with the following appropriate and eloquent remarks.

May it please your Honors,

I have a motion to submit, on behalf of the Members of the Bar.

I have been delegated, as their organ, to present certain Resolutions, which, with the permission of your Honors, I will presently read, expressive of the sentiments of the Bar on the occasion of the resignation of Mr. Justice Wilde, lately one of the members of this Court; and to ask,

that they may be entered upon your Records, as a lasting testimonial of our estimation of the official character and public service of that distinguished and excellent magistrate.

It is now more than thirty-five years since Mr. Justice Wilde was promoted to the bench of this Court. From that time until his recent retirement from that Bench, during a period of judicial service of no ordinary length, the members of the Bar, in the daily exercise of their profession, have had occasion to witness with admiration the promptness, the untiring assiduity, the fidelity, the impartiality, the devotedness to the public service, and the great learning and ability, which that eminent Judge has at all times manifested in the discharge of the arduous and important duties of his official station.

We have for some time had reason, while he was yet on the Bench, to look up to him with particular regard and reverence, as being the last survivor of those eminent magistrates, whose judicial labors, in the earlier stages of our progress in juridical science, contributed to build up, and from time to time improve and adapt to the various exigencies of our peculiar civil institutions and laws, a consistent system of jurisprudence, founded and framed upon the basis of the common law, recognized and adopted when our State Constitution was formed.

By the early education of Mr. Justice Wilde in the sound and wholesome learning of that class of Jurists now emphatically denominated the old school, his mind was trained and disciplined, and richly stored with legal science, in a manner which peculiarly fitted him for the judicial office, the duties of which he afterwards discharged with such conspicuous ability and such universal approbation.

By the course of his early studies, and by extensive practice at the Bar with eminent lawyers, his contemporaries, of great attainments in the recondite learning of the day, he acquired, before his elevation to the bench, a deep and thoroughly accurate knowledge of the great principles and rules of the common law in all its various ramifications.

Among other branches of the jurisprudence of the common law, that pertaining to real property then constituted and still continues to constitute a very essential and important part of our legal science. This seems to have been one of his early and favorite studies. The profound attainments of Mr. Justice Wilde in this department of jurisprudence, and his great familiarity with all its abstruse, and often arbitrary doctrines and rules growing out of the institutions of a former age, but so interwoven now with our jurisprudence, that they cannot safely and conveniently be discarded, enabled him, while he sat on the bench, as your Honors well know, to expound and administer, with singular readiness and ability, the principles of this important but intricate and difficult branch of our law.

This professional training gave Mr. Justice Wilde preëminence as a Judge in another important branch of legal science.

While he was at the Bar, where he became a distinguished leader, he cultivated a habit of close and logical reasoning, which, with his remarkable acuteness, and power of accurate discrimination, gave him great emi-

nence in the science of that celebrated system of allegation peculiar to the Courts of common law, which is so admirably calculated to separate the law from the fact, enucleate the substantial matters in controversy, abridge litigation, and lessen the labors of the Court and jury in trials at common law, known under the recently much abused name of special pleading. A system of allegation, which some of us, at least, regret, has not uniformly found that favor with our legislature, and with the profession at large, to which its transcendent merits in our estimation fully entitled it.

This preëminence of Mr. Justice Wilde in the recondite learning of the law of real property, and of special pleading, may perhaps be supposed naturally to have engendered an undue partiality for the nice technicalities, and rigid and unmeaning forms of the law. But the fact was quite otherwise. This excellent magistrate never allowed a regard for forms and technicalities to gain a mastery over his sound judgment and common sense. He never suffered justice to be entangled in a net of unsubstantial forms.

He never permitted legal proceedings to be employed as instruments of injustice. Falsity, chicanery, and trick, whether in pleading or in practice, found no favor with him; on the contrary, they were sure to meet with defeat and stern rebuke.

Deeply and preëminently versed as Mr. Justice Wilde was, while on the bench, in these particular branches of the common law, his legal knowledge was by no means defective, nor much less conspicuous, in the other departments of legal science. His capacious mind was enlightened, expanded and enriched, by a thorough acquaintance with the principles of mercantile law and general jurisprudence.

And we have more recently all of us witnessed, with what facility he embraced, and how ably he administered the broad and liberal doctrines of equity, and how eminently he succeeded in illustrating, expounding, and rendering familiar to us this comparatively new and most important branch of the jurisdiction of this Court.

In those legal judgments of Mr. Justice Wilde, which have been recorded on our books, the Bar have had occasion to admire the exemplary chasteness of his style, the neatness and conciseness of his judicial opinions, unembarrassed by any useless parade of learning, the clearness and logical precision of his reasoning, and the almost invariable accuracy of his conclusions.

In estimating the official character of Mr. Justice Wilde, the Bar would not do him justice if they omitted to notice his uniform demeanor towards all the members of our profession; for his kindness, his equanimity, his strict impartiality to us all, are universally acknowledged.

In the discharge of all his official duties, his promptness, his habits of dispatch, his quick and accurate perception of the main points on which a cause must turn, his ready command of both law and fact in trials by jury, his devotion to the public service, and his earnest and unremitting endeavors, while on the bench, to perform all that could be expected of

him in his office, regardless of extraneous objects, are admitted by all to be among the leading traits of his judicial character.

In fine, the Bar have regarded his administration of justice in this Court as eminently serviceable to the community. By the faithful discharge of his official duties, without fear, favor, affection, or the hope of any other reward than that which his small annual stipend, an approving conscience, and public gratitude, may afford, he has contributed, with his brethren on the bench, to inspire confidence in and respect for our civil institutions, our Courts of law, the law itself, and all those who administer it.

If the Bar on this occasion might with propriety allude to the character which this distinguished Judge had sustained in private life, to which he has now retired, they would bear witness to its unsullied purity, to the amenity, frankness and unaffected simplicity of his manners, to his remarkable colloquial powers, to the kindness and sincerity of his heart, and the warmth and cordiality of his attachments: virtues which have ever been as conspicuous in his private life as have been his learning and ability on the bench.

And now, on the retiring from the bench of so eminent and excellent a magistrate, the Bar cannot but express their feelings of profound regret and sorrow for the loss of his valuable services, though in the ordinary course of human events they had no reason to anticipate the enjoyment of the benefit of them until this late period of his life.

At the close of such a long official life of eminent usefulness, after such assiduous judicial labors of such unexampled duration, the Bar have thought, that on the retirement of such a magistrate from public to private life, some public testimonial of the estimation in which his official character and services are held, is due to him from those who have daily witnessed, and can justly appreciate them.

Impressed with these sentiments, the Bar have met for this purpose, and have unanimously adopted the Resolutions which they have requested me to present for entry on the Records of this Court, and which, with the permission of your Honors, I will now read.

Mr. Rand here read the Resolutions, and Chief Justice Shaw replied in the following words:

Gentlemen: — I am directed in behalf of this Court to say, that we reciprocate, with the sincerest sympathy, the sentiments of kindness, respect, and veneration for our late distinguished and beloved associate, Mr. Justice Wilde, embraced in the resolutions of the Bar, now presented.

The retirement of such a Judge, after a judicial career almost equally unexampled for its length, its brilliancy and purity, is an event well fitted to make us pause and reflect; and whilst we pay a just and grateful tribute of respect to legal eminence and high judicial excellence, in the character of one whom we have been long accustomed to regard with affection and respect, we may gather some wisdom and strength for the improvement of our own.

Of the legal learning, acquirements, and qualifications of Mr. Justice Wilde, it is scarcely necessary for me to speak in detail, before such an audience. Commencing the study of the law, at a period when the law of real property was of the highest practical utility and importance, his powerful mind was early devoted to that system of rules founded deeply in the principles of the common law, which still, after all its changes and modifications, lies at the foundation of our law of real property. Trained in the school of special pleading, where the keenest power of legal discrimination was in constant requisition in distinguishing the plausible from the sound, practising in a part of the Commonwealth where great interests were drawn in question depending on the law of real property, where the highest honors and rewards of the profession awaited the practiser, who was best versed in the knowledge and practice of this branch of the law, his mind here became so familiar with its minute and apparently subtile distinctions, that he could apply them promptly, like simplest principles to complicated cases. In this department, his learning, judgment, and experience, were valued by his associates, with a confident assurance seldom if ever disappointed.

But of his learning and legal attainments in the various departments of jurisprudence, to which the duties of his office called him, it is not my purpose to speak. A practice of twenty-four years at the bar, and his judicial labors, during the long period of thirty-five years, has made his name and his reputation conspicuous amongst living jurists.

But of his absolute and entire impartiality, a close and daily observation of twenty years enables me to speak with entire confidence. He seemed to have as little regard to parties, as if they were expressed in algebraical characters, nor did he seem to have any other interest in the result, than the mathematician in the solution of his complicated problem. Rigidly scrupulous, in ascertaining the truth and soundness of his premises, conducting the process by the strictest rules of legal deduction, his solicitude was, that his conclusion should be right, not whom it might affect.

Of another trait of his character I may speak with equal confidence, and I do it with the highest gratification. I allude to the warmth and kindness of heart, the courtesy and affability of manner, which ever characterized the intercourse between him and his brethren. Strenuous often, and firm in the maintenance of his opinions whilst convinced that they were right, no one could yield more readily or more gracefully, if satisfied that they were wrong. If, in the ardor of debate, in the earnest discussion of first opinions, involving questions of right, of the deepest interest and highest importance, a hasty word was uttered, it was a spark, extinguished as soon as struck, which left no trace behind it. After a most intimate official and personal association with the last remaining Judge, with whom I was first associated in this Court, one, on whom I could rely as a monitor, guide, and friend; under all circumstances, I consider it a privilege to say, that I must ever regard Judge Wilde with feelings of affectionate respect, which, whilst memory lasts, time can never obliterate.

But gentlemen, though we regret that a high sense of duty has compelled our eminent and beloved associate to withdraw from a situation, which he filled with so much credit to himself and usefulness to the community, but the duties of which he apprehended that his physical infirmities would prevent him from fulfilling, yet let us rejoice that he is still spared; and may his life be long spared, to enjoy the repose of a happy old age, and continue to be the delight of the social circle. May he long live to be an example to the young to seek for eminence by early and untiring industry, to encourage all to perseverance in the way of duty, and to diffuse the light and joy of a serene old age, amongst all those who may be still privileged to enjoy his society.

Hon. Judge Wilde. — At a meeting of the members of the Berkshire Bar, held at the Court House, in Lenox, on Monday the 4th November, 1850, Hon. Daniel N. Dewey was called to the chair, and Charles N. Emerson appointed secretary.

On motion, voted that a Committee of the Bar be selected to report resolutions expressive of our sentiments of high respect for the Hon. Samuel S. Wilde, late Judge of the Supreme Judicial Court, in view of his retirement from a station which he has so long filled, with honor to himself and usefulness to the Commonwealth. Hon. Increase Sumner, Charles Sedgwick, and Thomas Robinson, Esq., were appointed said Committee.

The Committee, through their Chairman, subsequently reported the following resolutions: —

Resolved, That the resignation of the Hon. Samuel Sumner Wilde, of the office which, for thirty-five years, he has held as one of the Justices of our Supreme Judicial Court, claims from us towards him, an expression of sympathy and regard we so deeply feel; we regret that this eminent Jurist has found it needful to retire from the Bench, of which he has so long been an ornament. Of his juridical history, constituting now one of the honors of the State, we are proud. We are proud of the fact, that Massachusetts is enabled to point to a Magistrate of her highest tribunal, who, for so great a period, in administering her laws, has nobly illustrated the strength, the purity and the excellence of our Judiciary, and has aided most essentially in securing for it the deep-seated attachment of our people, and the admiration of other States.

Resolved, That a review of the relation that has subsisted between Judge Wilde and us, is but the revival of the pleasanter and better recollections of our professional lives. Whether in our contests, over which he presided, we have been flushed with victory, or baffled with defeat, we have ever witnessed in him, the Just Judge, holding before us the scales of justice, with unwavering hand, with a learning and ability equal to every task, and with an integrity preëminently spotless. Nor less grateful are the remembrances of the social qualities always displayed by him, on the various occasions of our meeting him, when unemployed in the sterner duties of his office. And now, in bidding him farewell, upon his retirement from the station he has so honored, we rise up to do him reverence,

and from the bottom of our hearts, invoke upon him, health, happiness, and every blessing.

Resolved, That these Resolutions be entered upon the records of our Bar, and that copies thereof, attested by the chairman and secretary, be transmitted to Judge Wilde, and to the Chief Justice, and each of the Associate Justices of said Court.

DANIEL N. DEWEY, *Chairman.*

Charles N. Emerson, *Secretary.*

MY DEAR SIR, *Boston, Nov. 20th,* 1850.

I have had the honor to receive your kind favor, inclosing the resolutions of my esteemed brethren of the Berkshire Bar, on my retirement from the Bench of the Supreme Judicial Court; and I regret my inability adequately to express the grateful emotions with which I am impressed by this parting memorial of their kind feelings and friendly regards, which I most fully reciprocate. The laudatory terms, in which they have been pleased to express their approbation of my judicial services, do me great honor, much, very much greater than that to which I feel myself entitled.

For the kind feelings which prompted this favorable opinion of my brethren and friends of my services as a Judge, and for their cordial expressions of personal regard, and their feeling and impressive farewell, I can only return my warmest thanks, invoking for each and all of them, in their own words, "health, happiness and every blessing."

For the kind manner in which you have commemorated the resolutions of the Bar, I pray you to accept my best thanks, and believe me to be with great respect, Your obliged friend and obedient servant,

S. S. WILDE.

Charles N. Emerson, Esq.

Notices of New Books.

CASES IN THE OHIO REPORTS, OVERRULED, DOUBTED, LIMITED, AND CHANGED BY LEGISLATION. By M. E. CURWEN, of the Cincinnati Bar. Cincinnati: Wright, Ferris & Co., Printers, 1850.

THE little-page of this work indicates its object and character. In many respects, it resembles the well known collection prepared by Prof. Greenleaf. It is confined to Ohio cases. The author, in his preface, after alluding to the familiar remark of Sir William Jones, that "No man who is not a lawyer would ever know how to act, and no man who is a lawyer would, in many instances, know what to advise, unless Courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate," — adds,

"How far the Ohio Reports have been made upon these principles, the following considerations may show. A Judge, conversant, from a residence at the capital, and his high professional standing, with the practice of the Court in bank, states, 'That at chambers, the Judges, after examining a

case together, and determining upon the point upon which it is to be decided, leave it for one of their number to draw up their opinion for the reports. In writing out the opinion, of course, many matters appear in the opinion, as arguments and dicta, which the Court itself did not decide, and are, therefore, to be considered as the opinion of the Judge who writes out the opinion. The point which the Court decides appears on the margin or syllabus of the report, and hence the marginal note in the report sometimes appears a little different from the opinion.' 1 Swan's Practice, 2, note 9. The substance of this statement is, *that, as an expression of the opinion of the Court, nothing in the report is reliable but the syllabus.* Of late years, however, even the syllabus seems not to have been prepared by the Court, nor even under their supervision. 10 Ohio R. 513; 11 Ib. 357; 13 Ib. 361; 10 Ib. 263; 16 Ib. 309. It generally appears, on the morning after the decision is made, in the Columbus papers, where it is said to have been prepared by the official reporter, and is thence transferred to the published report, 'printed under the authority of the general assembly.' The syllabus cannot, therefore, be considered as reliable, and upon what the profession are to rely does not yet appear. But, in no ambiguous givings-out, they are informed that the 'opinions of the Judges are drawn up in great haste,' and sometimes without proper care; that 'some expressions in the report are well calculated to mislead the profession in forming an opinion of the grounds upon which the case was decided;' that wrong reasons have been assigned in the judgments for the grounds of the opinions; that the Court have overlooked, at times, material facts, or the want of indispensable averments in the pleadings; that their decisions, when sitting in inferior tribunals, are not authority; and that they do not consider themselves bound by their own decisions in bank."

We can only add that this work, for the preparation of which the author has so clearly shown the necessity, displays an accuracy of learning and a degree of patient labor which well qualify him for his task.

THE CIVIL LAW IN ITS NATURAL ORDER. By JEAN DOMAT. Translated from the French, by WILLIAM STRAHAN, LL. D., Advocate in Doctors' Commons. Edited from the Second London Edition, by LUTHER S. CUSHING. In two volumes. Boston: Charles C. Little & James Brown, 1850.

In our last number, we were able to speak of the publication of a valuable translation of Emerigon's Treatise on Insurances. We are now able to announce to our readers the appearance of another continental work, in an American dress, the reputation of which is almost as wide as that of Emerigon.

The work of Domat is unlike any treatise or commentaries, which English or American lawyers are in the habit of studying. It bears signs every where of the theoretical mind of France, and lacks the blunt practical wisdom of England. Thus Domat commences his work with a chapter on the first principles of all laws, which he argues were unknown to the pagans. From that topic he comes to the two great laws of man,

which consist of the commandments of the Savior, as enunciated in the gospels. From this he proceeds to the general plan of society, and the kinds of engagements which arise therein. The nature and extent of these engagements, their application to all the complicated relations of life, and the exemplification of them in that great repertory of wisdom and experience, the civil law, constitute his task. It is not too much to say of the manner in which this gigantic task has been performed, that it is the fruit of great learning, incredible industry, and a most thorough appreciation of his subject.

The work was first offered to English readers in the translation of Dr. Strahan. This translation was in many respects defective, and the American editor has striven to remedy some of these defects, without making an entirely new translation. The work has accordingly been collated with the latest French edition; the errors of Dr. Strahan's translation, wherever detected, have been corrected; the orthography and punctuation have been carefully revised; and antiquated expressions have been avoided. In order to facilitate reference, a system of numbering the paragraphs consecutively has been adopted, and a new and complete index has been prepared. The appearance of the work does great credit to the American editor and the enterprising publishers.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Alden, Albert	Springfield,	October 7,	George B. Morris.
Baxter, Samuel D. P. & Charles F., partners	Boston,	" 30,	John M. Williams.
Baxter, James, Jr.	New York,	" 30,	John M. Williams.
Bradford, Isaac	Charlestown,	" 3,	Asa F. Lawrence.
Buck, William G.	Springfield,	" 9,	George B. Morris.
Burgess, Henry C.	Chelsea,	" 25,	John M. Williams.
Cassedy, John	Coleraine,	" 1,	D. W. Alvord.
Churchill, Geo. W.	Lowell,	" 9,	Asa F. Lawrence.
Clarke, Anthony F.	Cambridge,	" 11,	Asa F. Lawrence.
Cooley, Geo. W.	Dorchester,	" 24,	Francis Hilliard.
Davis, Geo. W.	Boston,	" 5,	John M. Williams.
Gates, Phineas Jr.	Grafton,	" 30,	Henry Chapin.
Gibbs, John B.	Boston,	" 2,	John M. Williams.
Gouch, George	Springfield,	" 7,	George B. Morris.
Grout, Otis, Jr.	Leicester,	" 22,	Henry Chapin.
Haskins, John	Roxbury,	" 21,	Francis Hilliard.
Howard, Daniel P.	Sutton,	" 22,	Henry Chapin.
Hunt, Dwight	Longmeadow,	" 5,	George B Morris.
Hunter, Thomas	Boston,	" 21,	John M. Williams.
Ingram, James	S. Hadley,	" 23,	Myron Lawrence.
Jennings, Spencer	Springfield,	" 2,	George B. Morris.
Laha, Thomas	Roxbury,	" 17,	Francis Hilliard
Lovell, William S.	Newton,	" 3,	Asa F. Lawrence.
Murray, Samuel B.	Boston,	" 30,	John M. Williams.
Rittger, Nicholas	Westford,	" 4,	Asa F. Lawrence.
Roberts, Frederic A.	Holyoke,	" 26,	George B. Morris.
Sanford, Albert	Boston,	" 5,	John M. Williams.
Smith, George J.	Littleton,	" 18,	Asa F. Lawrence.
Smith, James	Boston,	" 1,	John M. Williams.
Vanorman, Daniel D.	Worcester,	" 14,	Henry Chapin.
White, Jeremiah W.	Stoughton	" 22,	Francis Hilliard.
Wiggins, Joshua D.	Boston,	" 16,	John M. Williams.
Williston, Thomas J.	Russell,	" 25,	George B. Morris.
Wilson, William L.	Springfield,	" 4,	George B. Morris.